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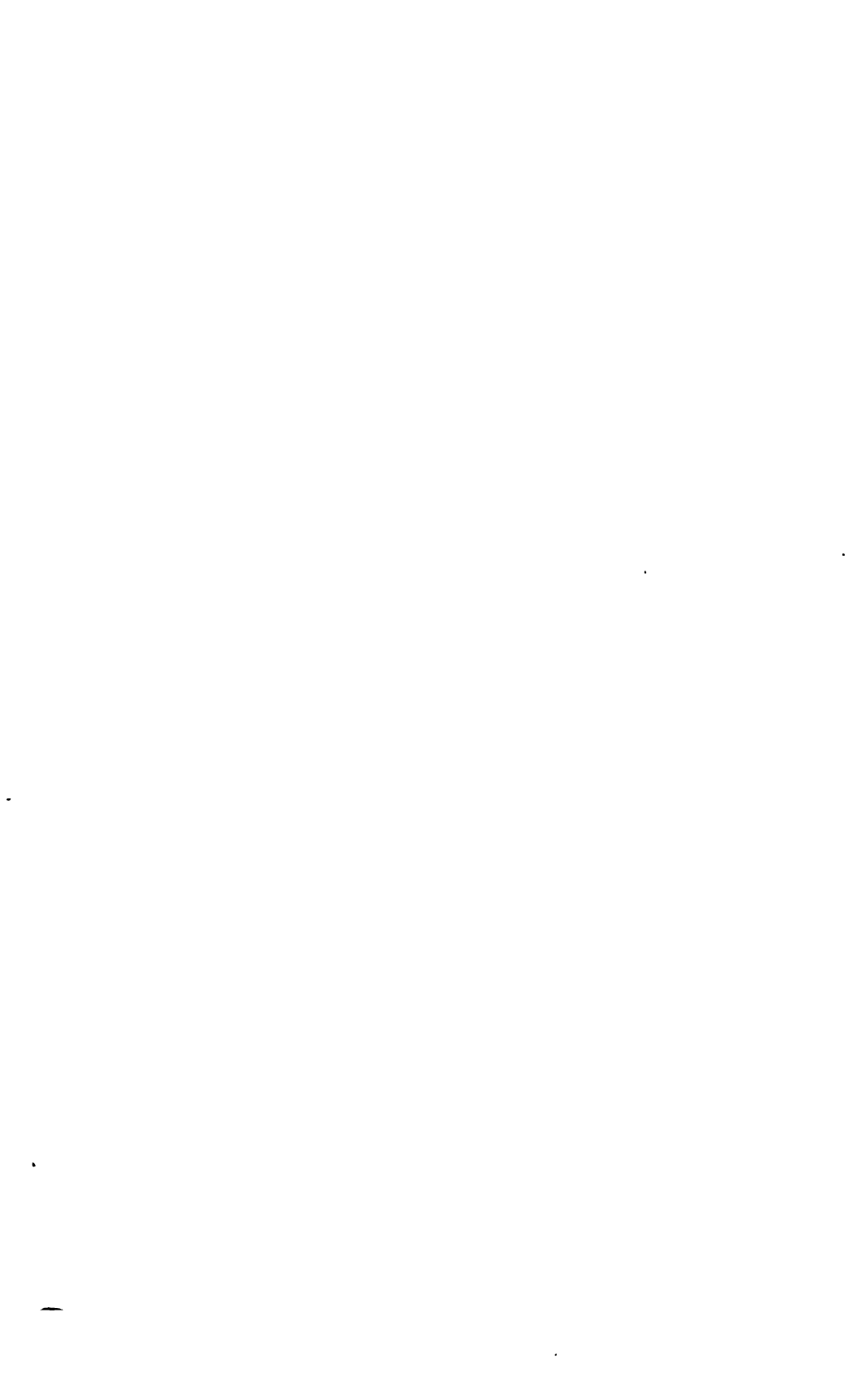
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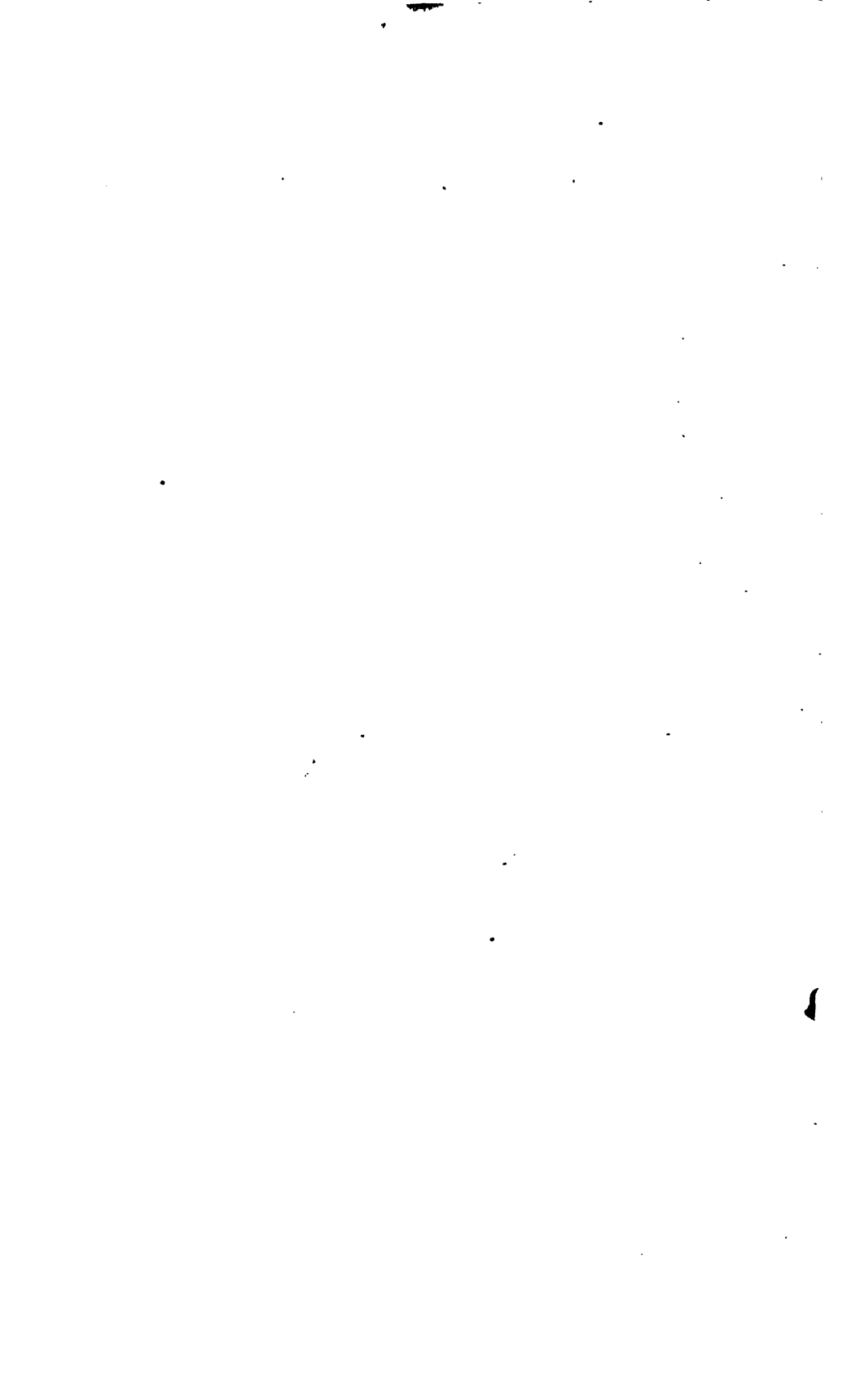


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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

FROM AND INCLUDING DECISIONS OF FEBRUARY 26, 1895, TO
DECISIONS OF APRIL 23, 1895.

WITH

NOTES, REFERENCES AND INDEX.

By H. E. SICKELS,
STATE REPORTER.

VOLUME CXLV.

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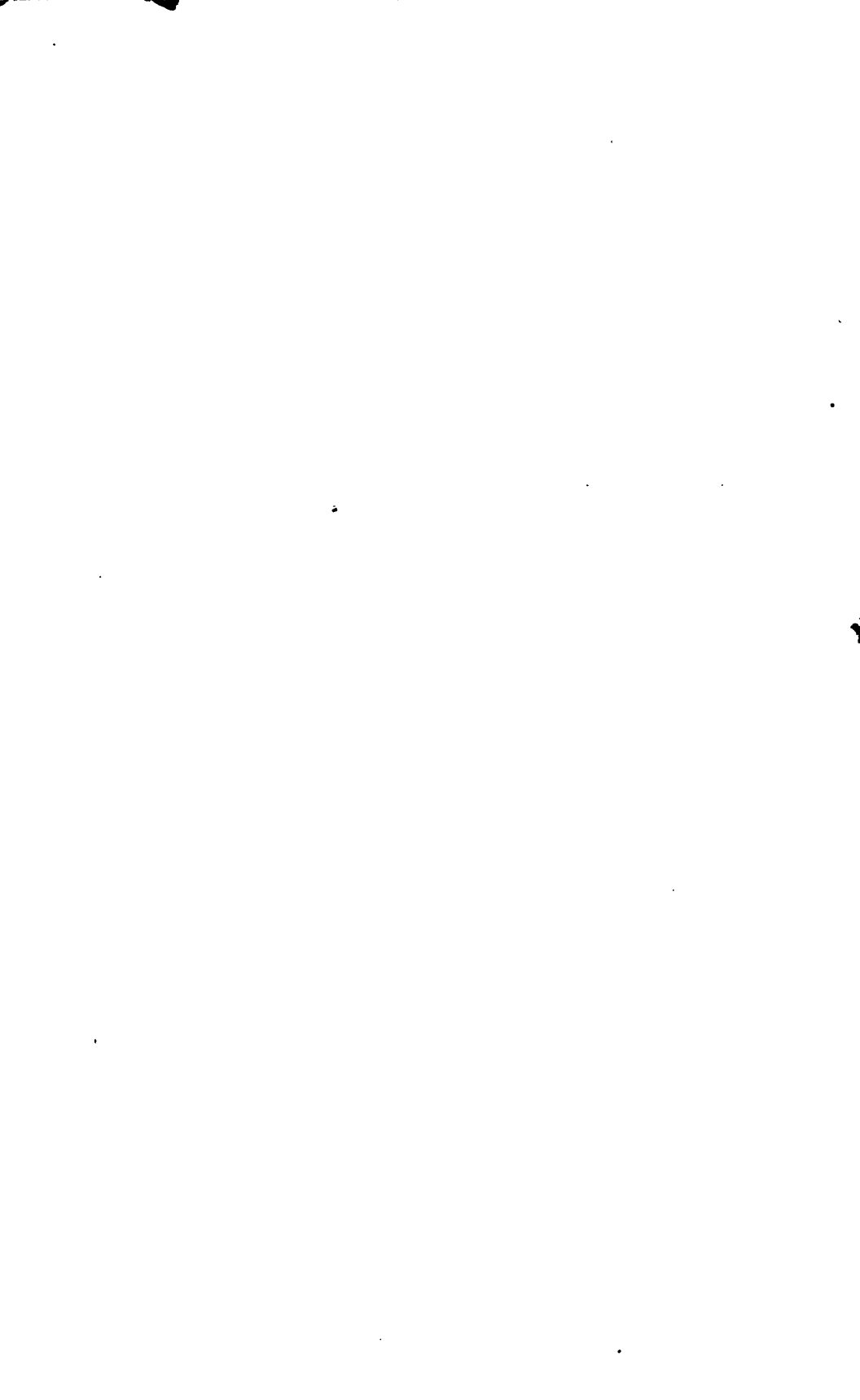


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CASES DECIDED

IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

COMMENCING FEBRUARY 26, 1898.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
ROBERT W. BUCHANAN, Appellant.

A witness may be re-examined by the party calling him upon all topics on which he has been cross-examined; and this, although the cross-examination was as to facts not admissible in evidence.

The protection extended by the statute (Code of Civ. Pro. § 835) to communications between attorney and client does not cover communications made to a friend, or to an attorney in the presence of a friend.

On the trial of an indictment charging defendant with the murder of his wife by administering poison, the defense on cross-examination of a witness for the prosecution sought to show that the witness had aided in the prosecution from revengeful motives; he was asked, among other things, if he had suggested to the coroner "anything about his inquiring about poison." The witness answered: "No." On re-direct examination he was asked and permitted to state what he did say to the coroner. *Held*, no error.

On cross-examination of another witness for the prosecution statements made by him to reporters of his suspicions as to defendant's guilt were brought out. *Held*, that it was proper to show on re-direct examination the reasons of the witness for such statements, and the source of his information on which they were based.

The prosecution was permitted to show that three days prior to the marriage of defendant and the deceased, she executed a will which was given in evidence. By the terms thereof she gave all her estate to her husband (if any) at the time of her death, and in the event of her death unmarried, after some small legacies, she gave her residuary estate to her physician, the defendant. *Held*, that the evidence was properly received.

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A deed of certain real estate executed by the deceased to defendant a few days after their marriage, and a deed of the same premises executed by him, after his indictment, to a third person, were received in evidence. *Held*, no error.

M., a friend of the defendant, took him to an attorney. *Held*, that M. was properly permitted to testify to the conversation between defendant and the attorney.

It was claimed, on the part of the prosecution, that defendant gave morphine to the deceased. It appeared that a physician called to attend her gave a prescription to be given in doses of one teaspoonful; that an hour later the defendant gave to her two teaspoonfuls of some liquid, and that from indications the taste thereof was bitter. An experienced apothecary was called by the prosecution and permitted to make up the prescription and to testify that the taste thereof was salty. He then mixed four grains of morphine in a teaspoonful of the medicine and described the taste as bitter. *Held*, that the evidence was proper.

The prosecution was permitted to prove declarations made by the defendant during his married life, reflecting upon his wife, showing hostile feelings toward and a desire to be rid of her. *Held*, no error.

The indictment contained two counts. The first charged that the crime was committed "by giving a deadly poison called morphine;" the second charged its commission by giving "a certain deadly poison to the grand jury unknown." After all the evidence was in, the district attorney, in response to a request by defendant, elected to go to the jury on the second count. A motion was then made by defendant's counsel to strike out all the evidence on the subject of morphine, which was denied. *Held*, no error.

After the jury had retired and after they had agreed upon their verdict they were taken to a hotel for dinner. While there P., one of their number, was taken suddenly ill; he became first unconscious and then delirious. A report of the occurrence was made to the court; the physician who attended upon P. was sent for and examined in the presence of the district attorney and defendant's counsel. The physician described what had taken place and gave his opinion that the attack had been caused by mental strain. Later in the day, the juror having improved, was brought in and took his seat with his associates. The court advised them to again retire and confer; this they did and shortly returned with their verdict. *Held*, that the verdict was properly received.

A motion was subsequently made for a new trial, one of the grounds being that there had been an illegal separation of the jurors, the affidavits averring that upon the removal of the sick juror the others separated, some going away alone. The affidavits of the jurors and court officers were read in opposition, which were to the effect that no juror was left alone, but that they were all in the charge of officers and that no communication was had by any person with them in respect to the case. *Held*, that a denial of the motion, so far as this ground was con-

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Statement of case.

cerned, was in the discretion of the court (Code Crim. Pro. § 465, subd. 8); and that the discretion was properly exercised.

A second ground for the motion was that the attack from which P. suffered was of such a character that his mind could not have been clear, sound and capable of judgment for some hours before and after, and affidavits of medical experts were read to that effect, they basing their opinion upon statements of what occurred at the time of the attack. Affidavits of other medical experts who had made a personal examination of the juror were read in opposition; they gave as their opinion that P. was in the full possession of his faculties and that the symptoms of the attack showed simply nervous exhaustion and hysteria; an affidavit of P. and affidavits of his employer and friends showing his mental capacity were also read. *Held*, that the motion was properly denied.

(Argued January 21, 1895; decided February 26, 1895.)

APPEAL from judgment of the Court of General Sessions of the Peace in and for the city and county of New York, entered upon a verdict rendered August 14, 1893, convicting defendant of the crime of murder in the first degree.

The facts, so far as material, are stated in the opinion.

Charles W. Brooke, W. J. O'Sullivan and Herbert W. Knight for appellant. The court erred in admitting a will in evidence executed by the deceased prior to her marriage to the defendant, in which she gave and bequeathed, after certain other provisions, her residuary estate to the defendant, whom she therein described as her physician, the date of which will was November 26, 1890, which was three days, as the testimony indicated, prior to her marriage with the defendant. (*People v. Sharp*, 107 N. Y. 427; *People v. Hale*, 38 Mich. 482; *People v. Harris*, 136 N. Y. 423.) The court erred in permitting the witness Macomber to detail the conversation with Mr. Herbert W. Knight, the counsel for the defendant, at which he was present as the confidential friend of the defendant, the admission of which was objected to upon the ground of prejudice. (*Bacon v. Frisbee*, 80 N. Y. 398; *Root v. Wright*, 84 id. 76; *Jackson v. French*, 3 Wend. 337; Code Civ. Pro. §§ 835, 836; Code Crim. Pro. § 392; *People v. Hayes*, 140 N. Y. 484.) It was error to give testi-

mony of general moral degradation and acts of wrongdoing on the part of the defendant in matters wholly disconnected and apart from the charge for which he is put upon his trial, with no other apparent purpose than to generate and create in the mind of the juror that prejudice and bias against him which the law in the first instance declares would disqualify him from acting as such juror. (*People v. Davis*, 56 N. Y. 95; *Riley v. Mayor, etc.*, 96 id. 331.) The court erred in admitting in evidence a deed of real estate situated on Halsey street, in the city of Newark, executed upon the 16th of September, 1892, by the defendant as grantor and "Annie B.," his wife, to Walter J. Knight of the city of Newark. (*People v. Bennett*, 49 N. Y. 137.) The first count of the indictment being withdrawn from the jury and abandoned by the prosecution, the jury had no right whatever to consider any of the matters pertaining to that count. The evidence which was submitted to support it was certainly not a proper matter for the consideration of such jury. The withdrawal of the count excluded it as proper matter to enter into their deliberations. Yet the court said, practically: "Though this count is abandoned and is not before the jury at all, they have no right to pass upon any question concerning it, yet I will retain in the case the evidence which was applicable to it and admitted under it, and offer it to the jury on the second count." This was error. (*O'Brien v. People*, 36 N. Y. 280; *People v. Stein*, 1 Park. Cr. Rep. 202; *People v. Curling*, 1 Johns. 320; *People v. Cooper*, 13 Wend. 379; *People v. Gilkinson*, 4 Park. Cr. Rep. 26; *Guenther v. People*, 24 N. Y. 100; *People v. Austin*, 1 Park. Cr. Rep. 154; *People v. Davis*, 56 N. Y. 95; *People v. Urlett*, 102 id. 251; *People v. Dominick*, 107 id. 30; Code Crim. Pro. § 416.) Before the conclusion of the trial a juror became so sick as to be unable to perform his duty, and the crisis arrived in which the court had no other alternative or power but to discharge the jury. (*Corn v. Fells*, 9 Leigh, 613; *Mahala v. State*, 10 Yerg. 532; *State v. Curtis*, 5 Humph. 601; *Hector v. State*, 2 Miss. 166; *U. S. v. Haskell*, 4 Wash. C. C. 402; *Fletcher v. State*, 6 Humph. 249; *Pierce*

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v. *Pierce*, 38 Mich. 412; *People v. Flaherty*, 22 Hun, 1; Code Crim. Pro. § 1079; *Wilson v. People*, 4 Park. Cr. Rep. 619; *People v. Hartung*, 17 How. Pr. 85; *Ostrander v. People*, 28 Hun, 46; *Wiggins v. Downer*, 67 How. Pr. 65.) The court erred in denying the motion of the defendant for a new trial. (*Stokes v. People*, 53 N. Y. 164.)

De Lancey Nicoll and *John R. Fellows* for respondent. It is submitted that this evidence fully supports the verdict of the jury finding the defendant guilty of the crime of murder in the first degree, and that there is, therefore, no ground for the contention that the verdict is against the weight of evidence, as claimed by the defendant, on his motion for a new trial. (Penal Code, § 183; *People v. Palmer*, 109 N. Y. 14; *People v. Bennett*, 49 id. 143; *People v. Pearson*, 79 id. 424; *People v. Harris*, 136 id. 423; *People v. Cignarale*, 110 id. 26, 27; *People v. Kelly*, 113 id. 647; *People v. Stone*, 117 id. 483; *People v. Trezza*, 125 id. 740; *Grattan v. M. L. Ins. Co.*, 92 id. 284.) It was relevant to show that just after his wife died the defendant requested Macomber to visit houses of ill-fame with him. (*People v. Harris*, 136 N. Y. 423.) Macomber was properly permitted to testify to a conversation had between himself, the defendant and Knight, and between himself, the defendant and Davison. (*People v. Hayes*, 140 N. Y. 484; *Jackson v. French*, 3 Wend. 339; *Whiting v. Barney*, 30 N. Y. 320; *Brand v. Brand*, 39 How. Pr. 193; *Britton v. Lorenz*, 45 N. Y. 51; *Prouty v. Eaton*, 41 Barb. 409; *Smith v. Crego*, 54 Hun, 22.) There was no error in permitting the witness Macomber to testify to conversations had with the defendant in January, 1892, when the trial of Carlyle Harris was in progress in the city of New York. (*Comm. v. Goddard*, 80 Mass. 402; *People v. Beach*, 87 N. Y. 511.) It was clearly relevant and material to prove the defendant's preparation for flight, even although he did not depart at the time arranged. (*Ryan v. People*, 79 N. Y. 593.) The deed of the deceased to the defendant of the property on Hal-

sey street, Newark, and the deed from him to Knight were properly admitted. (Whart. on Crim. Ev. § 3758.) The testimony of the witness Crouse, a member of the bar of the state of New Jersey, was competent to prove the law of that state as to the validity of a deed of real property made and delivered by a wife to a husband. (Code Civ. Pro. § 942; *Brush v. Wilkins*, 4 Johns. Ch. 519; *Kenny v. Clarkson*, 1 Johns. 385; *Throop v. Spatch*, 3 Abb. Pr. 23; *Spell v. Packard*, 5 Wend. 376; *Savage v. O'Neil*, 44 N. Y. 301; *Hun v. Hutchinson*, 64 id. 639; *Mourse v. DoYLES*, 2 id. 447; *People v. Tice*, 131 id. 651; *Brandon v. People*, 42 id. 265; *Connors v. People*, 50 id. 250; *Stover v. People*, 56 id. 315; *People v. Casey*, 72 id. 394.) There was no error in excluding the answer to the question, "Doctor, what did Dr. Buchanan say to you in relation to the sickness of his wife and her condition that evening, if anything?" (*People v. Montgomery*, 13 Abb. Pr. [N. S.] 251.) The motion of the defendant for a new trial on the ground that the prosecution having elected to go to the jury on the second count of the indictment, a variance arose between the indictment and the proof, and that all evidence which related to morphine should be stricken from the case, was properly denied. (*People v. Colt*, 3 Hill, 432; *Cox v. People*, 80 N. Y. 500.) No error is to be found in the charge of the court. It was a clear exposition of the law applicable to the case, and, so far as they were referred to, contained a fair and impartial presentation of the facts. No exception was taken to the charge by the defendant, and the several requests which the court declined to charge were properly refused. (*People v. McCallam*, 103 N. Y. 587; *Raymond v. Richmond*, 88 id. 671; *Cowley v. Meeker*, 85 id. 618; *Esmond v. Kingsley*, 19 N. Y. S. R. 665; *Tucker v. Ely*, 37 Hun, 365.) The motion of the defendant for a new trial on account of the fainting fit of the juror Paradise, which took place while the jury were at supper, previous to the rendering of their verdict, was properly denied. (Code Crim. Pro. §§ 416, 428, 465; *Dalrymple v. Williams*, 63 N. Y. 361; *Williams v. Montgomery*, 60 id. 678; *Regina v. Newton*, 6

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Opinion of the Court, per GRAY, J.

C. & K. 85; *Rex v. Barrett*, Jebb's C. C. 104; *Rex v. Scalbert*, 2 Leeches' C. C. 806; *Regina v. Beere*, 2 M. & K. 472; *Rex v. Edwards*, 4 Taunt. 309; *Goersen v. Comm.*, 106 Penn. St. 477; *Nichols v. Nichols*, 126 Mass. 256; *People v. Draper*, 28 Hun, 1; *People v. Montgomery*, 13 Abb. Pr. 207, 230; *Eastwood's Case*, 3 Park. Cr. Rep. 25; *People v. Hartung*, 4 id. 256.)

GRAY, J. The defendant was indicted by a grand jury of the city and county of New York for the crime of murder in the first degree, in killing Anna Buchanan, his wife, with poison administered to her on the 22d day of April, 1892. The indictment charged the commission of the crime in two counts; the first of which stated that the defendant had administered to the deceased "five grains weight of a certain deadly poison called morphine" and the second of which stated that he had administered to her "a certain deadly poison to the grand jury unknown," etc. Being tried upon the indictment, the defendant was found guilty, by the verdict of a jury, of murder in the first degree. From the judgment entered upon that verdict the defendant has appealed to this court and it is our duty, under the statute, to review the facts; in order that we may become satisfied that the verdict was neither against the weight of evidence, nor against law and that justice does not require a new trial of the issue. In the language of the statute, we are to "give judgment without regard to technical errors, or defects, or to exceptions which do not affect the substantial rights of the parties." The responsibility and labor thus devolved upon the court are very great. It devolves upon us to pronounce upon the sufficiency of the proofs and the substantial correctness of all the proceedings upon the trial, which preceded the rendition of the judgment of death. This responsibility is only sensibly lessened, when we can see that the verdict of the jury was based upon sufficient evidence and that the defendant had a fair and impartial hearing.

The examination of this very large record has been care-

fully made and a patient and conscientious consideration given to the facts elicited upon the trial and to the points made by the skillful counsel for the defendant, in his effort to procure a new trial. It is our judgment that nothing appears upon the record, which would justify us in reversing the conviction. The evidence upon which the defendant was found guilty is wholly circumstantial in its nature; but all the circumstances were pregnant with his guilt and combined to denounce him as the sole author of a crime by which his wife was deprived of her life. The evidence was abundant and satisfactory to establish the fact of her death having been caused by poison and not to have been the result of some natural disease. The endeavor to demonstrate the contrary was by no means convincing. While the proof of a death from unnatural causes must rest upon the investigations and the opinions of experts and confusion may often result from the irreconcilable character of their testimony, it is not so difficult in this case for us to disregard that given by the medical experts for the defense. The detection and punishment of a crime, committed secretly and with precautions against a knowledge of it becoming possible thereafter, of necessity, justify, if not compel, the submission to the jury of every fact and circumstance, which may reasonably bear upon the act, or the motive for it. The justification, of course, does not exist, if neither connection, nor illustration, can be seen in the facts offered to be proved. In *People v. Harris* (136 N. Y. 423), we had occasion to consider the reasons which make the acceptance of a verdict, based on circumstantial evidence, satisfactory and the discussion need not be resumed here. In the present case, the judicial investigation is aided in a surer degree, than in the *Harris* case. In both cases the husband was charged with killing his wife with poison; but in the former the marriage relation was secret and the opportunity of the defendant less evident, while here the intimate marital life existed and there was the conspicuous fact in the case that the defendant was seen to administer to his wife at her bedside something, which the circumstances satisfied the jury, and which satisfy us,

could not have been the medicine prescribed for her by the physician, but which was some part of the poison which caused her death.

In order to demonstrate that which is the primary fact to be established ; namely, that the deceased came to her death by poisoning, it will be of use to detail certain general and known facts. In April, 1892, the deceased was living with her husband, a practicing physician, at 267 West 11th street, in the city of New York, and was of the age of forty-nine or fifty years. Her habits were and had been temperate and her health was testified to, by those who had known her, as having been good for the previous fourteen years. On Friday morning, April 21, 1892, after eating a hearty breakfast, she was taken ill ; feeling severe pains in her head and unable to stand up. She was placed upon a bed and Dr. McIntyre, a physician, was called in at about eight o'clock ; who found her complaining of excruciating pains in the head and of a tightness about the throat, which made it difficult to breathe. She was nervous and apprehensive. Her temperature was normal ; but her pulse was accelerated. His examination led him to believe the case to be one of hysteria and he prescribed, as a nervine, a small dose of bromide of sodium mixed with ginger syrup and water ; to be given in doses of one teaspoonful every two hours. At two o'clock of the afternoon he called again and, finding the symptoms aggravated, changed the prescription, by adding two drachms of chloral hydrate to the bromide ; the doses to be the same as before. An hour later, at about three o'clock, the defendant was seen to give his wife a dose of two teaspoonfuls of medicine. After taking it she reached for an orange and bit into it, or sucked from it, as though there was a bitterness of taste. She spoke rationally ; but in ten or fifteen minutes she fell into a deep sleep. At seven o'clock she was found by Dr. McIntyre and another physician in a state of profound coma ; with the breathing stertorous, the respiration slow, the pulse very rapid, the face flushed, the skin hot and dry and the eyeball irresponsive to the finger touch. They treated her for possible idiosyncrasy to chloral ; without restoring her to conscious-

ness. Later in the evening the physicians returned and found the same condition. They concluded the deceased was suffering from cerebral apoplexy; a conclusion reached by the exclusion of either uræmia, embolism, or narcotism from chloral; in part, because of statements by the defendant and, in part, as the result of diagnosis. The next morning she was found in the same condition of coma, with a higher temperature, a flushed countenance, a warm skin and with the pupils of the eye normal, save a slight dilation in the right one. The case was treated as one of cerebral apoplexy. She died in the afternoon and was buried on Tuesday. Her body was exhumed forty-two days later, at the instance of the district attorney, and subjected to a medical examination. The body appeared to be wonderfully well preserved. The autopsy was performed by two skilled pathologists and revealed no cause for death in any lesion of the brain, or in any disease of the spinal cord, or of the various organs of the body. The examination of all the organs and of other matters taken from the body was made in gross and microscopically and no evidence was found of cerebral hemorrhage, or of any disease having existed which would account for the death. An examination was then had at the hands of experienced chemists, who subjected to an analysis the intestines and their contents, the stomach and its contents and the liver; being those portions of the body more easily revealing the presence of poisons. They applied as tests six re-agents, generally approved and accepted by chemists, as methods for determining the presence of morphine poison, and, in addition, a physiological test. The result of all the tests taken together was to establish the presence of morphine to the extent of one-tenth of one grain. The physiological test was performed by injecting a portion of the residues of the viscera in a frog and by injecting fractions of a grain of morphine in other frogs of the same size, to get the comparative effect of the several injections. It was their opinion that a discovery of that amount of morphine indicated, under all the conditions, a dose of from four to five grains of morphine. The chemists also found a substance

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Opinion of the Court, per GRAY, J.

which was consistent with atropine, which is a preparation of the belladonna plant. It answered the chemical and physiological tests of atropine, except in one instance, and the failure there was consistent with the presence of atropine; inasmuch as that drug upon the application of the same re-agent did not reveal itself. Two physicians were then examined and in answer to a hypothetical question, which fully and fairly resumed the facts connected with the illness and death of the deceased and the subsequent pathological and chemical examinations of her body, they gave it as their opinion that she had died from narcotic poisoning; the narcotics being morphine and atropine, or some other preparation of belladonna. In their opinion the symptoms of the morning of Friday pointed to atropine poisoning and from the afternoon on to a combined action of that drug and morphine. One witness stated: "The picture is of a modification of morphine symptoms, such as is known to be produced by atropine." It appears from the evidence that the usual symptoms of morphine are modified by atropine and that there results a slowness of respiration, a dryness of the skin and the flushing of the face, the two latter of which are characteristic of atropine poisoning; while the coma was characteristic of the two poisons combined. In the opinion of these witnesses a dose of at least three grains of morphine must have been given. I should add that the embalming fluid injected into the body was found to contain neither morphine nor atropine.

As against the evidence produced by the People to prove death by poisoning, the defendant called a pathologist, who disagreed with the diagnosis as to the condition of the deceased on the Friday morning, and gave it as his opinion that she was suffering from hysteria and, in answer to the hypothetical question, said that she died from uræmic coma, or coma resulting from cirrhotic changes of the liver. He admitted that death could not have been from cerebral hemorrhage; but he thought that the People's witnesses had mistaken a substance called ptomaine, which is a poisonous product of putrefaction, for morphine. Two chemists were, also, called as witnesses.

One of these testified to the existence in bodies, after the lapse of some time, of these chemical products called ptomaines. He did not believe that the People's chemists could have tested with any certainty for morphine, or atropine, with the impure residues of the viscera and that they must have mistaken the characteristic re-actions. The other witness criticised the method of the People's chemists as useless and testified to the existence of a ptomo-atropine; which is a ptomaine showing the same re-action that atropine does. To meet these criticisms the People's chemists were re-called and gave further evidence in reply. One of them performed before the jury similar experimental tests to those applied to the residues from the viscera of the body and, apparently, with the result of sustaining his previous testimony as to the characteristic or color re-action obtained. The issue between the expert witnesses for the prosecution and those for the defense, which the jury were to pass upon, was not, in my judgment, very difficult to decide. On the one hand they had the evidence given by two pathologists, who had actually examined the body with the most scrupulous and minute attention, that the condition of the body was one of remarkable preservation and revealed no cause for death in any disease of any of the organs, of the spinal cord, or of the brain. They had the evidence given by two chemists, skilled in toxicology, who had applied all the known and accepted tests for the discovery of the presence of poisons, that they had isolated one-tenth of a grain of morphine and had found a substance consistent with atropine and acting as atropine would under like conditions. Finally, they had the evidence given by two medical practitioners; who, upon the conditions disclosed by the evidence, in connection with the illness and death of the deceased and with the subsequent expert investigations conducted upon her remains, stated that the sensations and death of the deceased were consistent with and pointed clearly to a poisoning by atropine and morphine. The evidence of the pathologists was explicit that death was not and could not have been, under the conditions disclosed, caused by uræmic,

or cirrhotic, coma and the jury were well warranted in relying upon the evidence of witnesses; all of whom were skilled and eminent in their profession. There was not enough doubt cast upon it in the evidence of the witnesses for the defense; for the pathologist had not seen the body and the two chemists had not examined the contents. If they criticised the tests or methods of the People's witnesses and disbelieved their statements as to results obtained, their evidence did not, necessarily, subvert, nor shake, the People's proof; in part because of the theoretical basis of their opinions and in part because the subsequent examination of the People's witnesses established, or tended to establish, the reliability of their previous statements as to chemical results.

It was sought to introduce an element of doubt into the case made by the People by evidence as to the existence of ptomaines in bodies in course of putrefaction. The discovery of these poisonous products of decaying, or dead, animal matter is recent and they are said to resemble the vegetable alkaloids. We may concede, as not unlikely, in the absence of suspicious symptoms preceding and attending the death of a person and where the chemical tests have been inexact or incomplete, that the charge of a death being caused by poison would be insufficiently borne out by the discovery of a substance, which, while responding to several of the tests for morphine, or for atropine, would be equally consistent with the existence of ptomaines. In such a case the person charged with the crime might be entitled to the benefit of the doubt. But the facts were quite other here. We have the physical symptoms preceding death and the uniform results of approved and exhaustive chemical analysis. Professors Doremus and Witthaus, the People's chemical experts, testified to their familiarity with these ptomaines from study and observation and that they could not have been mistaken in their conclusions as to the presence of pure morphine and of a substance resembling atropine. Professor Vaughn, the chemical expert for the defense, had testified that the color test for morphine would not be reliable in the presence of the impurities of the resi-

dues from the body ; that the characteristic re-action of pure morphine can be obtained only when it is in a pure state. He spoke of one well-known ptomaine, called indol, as giving the six re-actions of morphine in such a manner as not to be distinguished from morphine in impure solutions. Professor Witthaus, being re-called, applied the same test used in his investigations to the ptomaine, called indol, and to morphine and, showing the contrasts between the re-actions of the two substances, testified again positively that the color obtained from the pure morphine was similar to that ultimately obtained in the tests applied to the residues from the body of the deceased. A circumstance may be alluded to as confirmatory of the statements of the expert witnesses for the prosecution, as to the discovery of morphine in the body. It appeared by the testimony of several witnesses upon the trial that the defendant had said to them that morphine would be found in his wife's body. That statement was made when the exhuming of the body was in question and when he apparently sought to anticipate the finding of morphine by saying that his wife was a morphine eater. The examination and cross-examination of the experts were protracted and a generous latitude was afforded to the defendant's counsel by the learned recorder ; who did not err on the side of severity. The extended examinations of these witnesses probably had the merit of enabling the jurors to judge of the competency of the experts and of the accuracy of their evidence and to weigh the probabilities of the case ; though, probably, more or less incapable of appreciating the details of the exhibition of scientific knowledge and tests, which was being given for their benefit and instruction.

Even if we had a doubt as to the cause of the death, we would not be justified in reversing the verdict of the jury ; for there was an abundance and a preponderance of evidence to support their finding. Through the evidence describing the symptoms, the distinction between them and those of a disease suddenly developed became possible. If it is plain, then the verdict of the jury should not be disturbed ; which pronounces in accordance with it and which is supported by

the evidence of the autopsy and of the chemical analysis. The discussion upon this branch of the issue has been somewhat prolonged; but it is justified by its gravity and the necessity of assuring ourselves that its determination adversely to the defendant was not arrived at without evidence which was clear and convincing. It was in the sole province of the jury to decide, upon the evidence, what was the cause of the death of the defendant's wife and, in my opinion, their decision is not only supported, but could not conscientiously have been made otherwise.

The next question, then, which was to be determined by the jury, was whether the defendant was guilty of the charge of having administered the poison to his wife, which caused her death. That is an indispensable fact; which depended for its proof here upon evidence of a circumstantial nature. The consideration of the question calls for a somewhat extended review of the facts disclosed by the evidence.

The defendant was born in Nova Scotia, in 1862, and came to New York in 1886, with his wife and a young daughter, to practice the profession of medicine. In the summer of 1890, he obtained a divorce from his wife. Later in the same year, he became acquainted with a woman in Newark, New Jersey, by the name of Anna B. Sutherland; whom he claims to have treated professionally. She was then some twenty years his senior in age and was engaged in keeping a house of prostitution, or of assignation. According to his statements, she became infatuated with him and on November 26th, 1890, made a will; by the terms of which she gave all of her real estate to her husband (if any), at the time of her death and, in the event of her death unmarried, after small legacies to a sister and brother, she gave the whole residuary estate to her physician, the defendant. Three days later, she was married to the defendant. Twelve days after the marriage, she conveyed her Newark house and lot by deed to the defendant, in consideration of one dollar. They resided after the marriage in West 11th street, New York city. The fact of the marriage he endeavored to conceal, and for a long time denied it

to friends and companions. He represented that she was his housekeeper and that she was importuning him to marry her; but that it would ruin him to marry a woman of her reputation. Dissensions arose between them and they became dissatisfied and wearied with each other. She resented his neglect and dissipated conduct. Towards the end of 1891, she wanted her property back and seems to have threatened to return to Newark to resume her former occupation. During the winter of 1891 and 1892, and in the following spring months, according to the testimony of several of his friends, the defendant expressed himself as unable to endure her; variously stating that she was unbearable; that she was "hounding him to marry her or to deed the property back;" that he did not want her to go back and keep a house of prostitution, because of the injury it would do him; that he would "dump the old woman," or the "old hag;" that he had made up his mind to get rid of her, "no matter what it cost;" that he would let the New York house and, if necessary, leave the country. In February he commented, in the presence of several persons, upon Carlyle Harris not understanding his business and upon his leaving a trace behind; (Harris then having been tried and convicted for the poisoning of his wife). He made preparation for breaking up housekeeping, by leasing the New York house. About, and previously to, this time, the witness Macomber, with whom he appears to have been on most intimate terms of friendship, testified that the defendant said to him his wife had kidney trouble and would not live long; that she had threatened to poison herself and that he had told her to "help herself," as she knew where he kept the poisons. Though she was not taken ill until Friday morning, April 22d, and had been previously perfectly well, on Thursday he told Macomber that his wife was sick; that he thought Bright's disease was developing and she would not get over the attack. At this time the defendant was in the habit of taking all his meals at Macomber's restaurant. The deceased was suddenly seized with illness after her breakfast. Her previous good health

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was testified to by a witness, who had known her intimately for years, and he, and others who saw her just before her attack, testified to her healthful appearance. Though Dr. McIntyre, who was called in at eight o'clock on Friday, diagnosed her case as one merely of hysteria, the defendant told Macomber at breakfast, and again at noon, that she was worse and would not live twenty-four hours. Other witnesses testified that during the afternoon of Friday he had spoken of his wife, to the effect that she was about to die. In the evening of Friday, he exhibited articles of jewelry and manufactured a story that his wife had given them to him before witnesses, summoned in by him. On Saturday morning he told Macomber "the old lady" would not live the day out and in the afternoon, when she died, he took a walk with him and remarked that "it looks as though Providence was smiling upon him;" that "she was going to quietly step out and he would avoid all trouble." Turning to the scene of the sick room, we find Dr. McIntyre returning at two o'clock to find the symptoms worse. The defendant told him he had given her the medicine regularly. He changed his prescription by the addition of chloral hydrate to the bromide and, having prescribed the same dose of one teaspoonful every two hours, left. A little after three o'clock Mrs. Brockway, bringing with her, at defendant's request, a nurse, entering the sick room, saw the defendant give his wife two teaspoonfuls from a phial containing a liquid. Though the nurse could not state positively that she saw two teaspoonfuls given, it was the fact, afterwards corroborated out of the defendant's own mouth; who sought to explain it on the ground that all the teaspoons were packed up, previous to departure, and that the only teaspoon available was a small one of his child's. It was subsequently proved, by the evidence of Mrs. Brockway and the nurse, that the teaspoon was of the usual size, and by the latter and a man who worked in the house, that there were other teaspoons about. Immediately after taking the medicine, the deceased was seen to make a wry face and to take up an orange and to bite, or suck it. In giving the sec-

ond teaspoonful, the defendant's hand shook, so as to spill some of its contents upon his wife's neck. At the time of Mrs. Brockway's visit, the deceased was able to talk rationally and to remark how well she had felt in the morning, before her sudden seizure. In ten or fifteen minutes she fell into a profound slumber, from which she never awaked. The defendant left the room hurriedly, after giving the dose to his wife and upon the entrance of Mrs. Brockway and the nurse; alleging important business. He returned in an hour, felt her pulse and again went out. While in the house that time a man whom he had some time previously engaged to cart his effects over to Newark, called to inquire about the job, and was told by the defendant that his wife was sick; that he did not believe she would get well, and his services would not be needed. In the evening when Doctors McIntyre and Watson, finding a continued state of coma, thought she might be idiosyncratic to chloral, the defendant volunteered the explanation that such was not the fact; for the reason that his wife had been under Dr. Janeway's care, and that she had had three or four doses of eight grains of chloral each day. It was subsequently proved by the testimony of the only two doctors of the name of Janeway, that they had never treated, or prescribed for, any woman of her name. Again, upon the same occasion referred to, when, because of his statement, the physicians excluded narcotism from chloral and upon examination other causes and concluded in favor of cerebral hemorrhage, the defendant volunteered the further statement that the father of his wife had died of apoplexy. It was subsequently shown that he died of gangrene in the foot. The next day, Saturday, about four o'clock, the death occurred. Before the occurrence the defendant went out and did not return till the evening after the death. He then said to the nurse that he was going to Philadelphia in a late train to see his wife's brother. It was during that afternoon's absence that the walk and the conversation with his intimate, Macomber, took place, in which he had expressed himself about the smiles of Provi-

dence. In the evening of the Saturday, when he returned to Macomber's, he told him "the old lady" was dead and he was going to a hotel for the night, rather than stay in the house with a corpse. On Sunday morning, about nine o'clock, he went to his house and gave the nurse to understand he had returned from Philadelphia and that his wife's brother was a very sick man. Upon the return from the funeral the defendant, placing his daughter in one carriage, returned with three of his friends in another. He expressed to them his great relief at the death and stopped to drink in several saloons. A woman residing in a house at which he called, upon the return from the funeral, testified that he said to her that he had just buried his sister. She remarked to him that he "was feeling pretty jolly over it," and he replied, "those things cannot be helped; we all have to die." She saw him then try to embrace a woman, who was residing in the house. He made various statements to his friends, respecting his acquisition of property through his wife's will, and conducted himself in a dissipated manner. After some days he went to Nova Scotia; where, within three weeks of his wife's death, he re-married his first wife and returned with her to New York. He went to see his friend, Macomber, and spoke of the charges which had appeared in the "World" newspaper, that he had poisoned his dead wife and had re-married his first wife. To him and to others he denied the re-marriage. In an interview with a reporter for the "World" he characterized the report of his re-marriage as absurd; denied that his deceased wife kept an assignation house, and concocted a story as to how he had met her; gave her age as thirty-six; said she died of cerebral hemorrhage and denied she was a morphine eater. Becoming alarmed by the newspaper charges, he spoke to two or three persons about going away till "the thing blew over." He manifested the utmost uneasiness about the investigation and the exhuming of the body. He made preparations to leave the city under an assumed name and arranged with Macomber for information through a telegraphic code, in the event of the grave being opened. Upon one occasion he went

with friends to the cemetery to see if the grave had been opened, and mistaking his way, and coming upon one that was, he showed great alarm. He sought a residence for himself, his wife and daughter, under assumed names, in the upper part of the city. When it was suggested that he had nothing to fear from an investigation, he said that his deceased wife was a morphine eater and that morphine would be found in her body and, coming so soon after the *Carlyle Harris* case, that he would be tried for his life. He even told a story of how he had caught his wife eating morphine. To his friend and companion, Macomber, upon an occasion, he admitted that his wife died of an overdose of morphine and that she was in the habit of taking belladonna for her bowels, which would obviate the usual effects of morphine. His explanation was, when asked why he did not tell that to the physicians, that they would report the case and there would be an inquest. He consulted lawyers about extradition treaties. To some friends he expressed the wish that he had cremated his wife's body. It is clear from the evidence given by the great array of witnesses, called to testify concerning the defendant's acts and declarations at various times, that he was in an apprehensive condition of mind and manifested the utmost dread of an investigation.

Very much more could be narrated from the record to exhibit the conditions of his mind; which, before his wife's death, showed that he dwelt upon such an event and anticipated its occurrence, and, upon the happening of the event, showed, first, a great satisfaction, in committing various excesses and in immediately re-marrying his divorced wife, and, subsequently, when the rumors arose about the sudden death, showed restlessness and fear; all being conditions quite incompatible with innocence. It is true that the defendant was examined in his own behalf and denied the commission of the act charged and more or less of the statements testified to as having been made by him. But he involved himself in a maze of statements, of such untruthful and incredible nature, as to justify the jury in discrediting him generally and espe-

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cially when in conflict with those of persons, who, with the possible and not very important exception of the witness, Smith, had no apparent personal motive to procure his conviction. He admitted the untruthfulness of his statement that he went on the night of the death to Philadelphia, to see a sick brother of his wife, or that she had a sick brother there, and justified it by the plea of a motive to conceal the facts about his wife's relations. He said he went that night to a certain hotel in Newark; but could not remember whether he registered under his own, or a false name. Upon the production of the hotel register, he was unable to identify any signature as his own. His denial that he knew, previously to his marriage, that his wife had kept a house of assignation, though immaterial, is incredible and is in contradiction of what several of his friends testified to. He said he had treated her for Bright's disease before marriage and that afterwards she was several times treated by Dr. Janeway, in New York, for kidney trouble. Both of the medical practitioners of that name in the city denied knowledge, or the treatment, of any such woman; whether under her former name of Sutherland, or that of Buchanan. He had spoken of her going to Bellevue Hospital, to find Dr. Janeway, and of her going as a dispensary patient against his wishes; but the records of that hospital showed that no prescription had ever been put up for Dr. Janeway and that no patient of her name was on the books. He contradicted Dr. McIntyre's testimony as to the statement made by him, that his wife was accustomed to chloral. He also contradicted the testimony of one of his friends, with whom he was forced to admit he continued to be on good terms, that he had spoken to him in prison of his wife being a morphine eater and of that being the cause of her death. He endeavored to explain why he was giving his wife two teaspoonfuls of the mixture from the phial, on the Friday afternoon when seen by the two women who entered the room, and said it was a child's small teaspoon and required being twice filled for the dose. He said all other spoons had been packed up. In these state-

ments, as I have mentioned, he was contradicted by the nurse, by Mrs. Brockway and by the man who worked for him about the house. The testimony of the defendant, read in the light of all the evidence and of its own inconsistencies, induces the conviction that he was untruthful in most of its material statements. In one instance, the evidence that he had stated that his wife was a morphine eater and that morphine would be found in her body when exhumed, was corroborated by the testimony of Knight, a lawyer whom he was taken by Macomber to consult, in Newark. His denial of the commission of the act charged, is to be given its full weight, in view of the gravity of the offense and the penalty inflicted by the law; but the weight of the evidence and its whole effect are to not only confirm the conclusions reached by the jury; but, in my opinion, to make any other impossible. If we regard the chain of events from the time when, after the will made in favor of a husband, the defendant made the ill-assorted and degrading union with the deceased, along through their unhappy married life in New York, to her sudden seizure, in full health, with symptoms singularly consistent with narcotic poisoning; with his inexplicable conduct during the seizure and continued after the death, first in debauchery, then in the re-marriage with his divorced wife, within three weeks, then in the exhibition of an apprehension of an investigation, followed by preparations for flight and a concealment under an assumed name—in all the facts of the case, we find a chain forged, which prevents the accused from evading the judgment pronounced upon him by the trial court.

Motives to commit the crime were not wanting; whether they lay in the desire to secure himself in the possession and enjoyment of the property of the deceased; or in the desire to avoid the degrading exposure of his marriage with a woman of such a reputation. In the former case, the will gave the estate to the husband; but it was revocable and revocation was not improbable after the dissensions between them. In the latter case, she threatened to go back to her house in Newark and to resume her former occupation. It is

immaterial which was the actual motive. The existence of either suffices and every thing that could throw such light upon his acts as to reveal a motive was admissible.

In the presence of the grave consequences of the verdict, I have sought to find the evidence of acts consistent with a probability of innocence ; or some weakness in the chain of circumstances, which would warrant us in saying that some were at variance with the probabilities of guilt. I am not able to find either and I must advise an affirmance of the judgment ; unless the learned recorder, who presided at this trial, committed some error thereat in his rulings, which, because prejudicial to the defendant, necessitates, in the interests of justice, the ordering of a new trial.

His charge was clear, full and satisfactory upon the facts and the law ; so much so that the counsel for the defendant noted no exceptions to it. The exceptions taken to the rulings of the recorder upon evidence have all been carefully considered in the review of the case. A few of them, of sufficient importance to be passed upon, will be referred to.

The witness Smith, who had been an intimate associate and a partner of the deceased woman before her marriage with the defendant, was examined to show her excellent condition of health. Upon cross-examination it was sought to show that he had aided in the matter of the prosecution of the defendant from revengeful motives. He was asked if, after the woman's death, he had communicated with the coroner and, upon his saying that he had, was asked if he gave him "some information about a will to Dr. Buchanan." He said he did not know there was a will in existence, at the time. He was then further asked if he had suggested to the coroner "anything about his inquiring about poison ;" to which he answered, no. Upon his re-direct examination by the district attorney, he was asked to state what he did say to the coroner ; and he was allowed, over the objection of the defendant, to give the conversation. The ruling was not error. The object of the defense was to discredit the witness, by showing the existence of malign motives to revenge himself on the

man who had supplanted him. If the defendant chose to open an inquiry as to a conversation between the witness and the coroner, it was proper enough and just that the jury should be placed in possession of what the conversation actually was. I understand the rule to be that a witness may be re-examined by the party calling him upon all topics on which he has been cross-examined, for the purpose of explaining any new facts which came out; but the re-examination must be confined to the subject-matter of the cross-examination. He may be questioned to show the meaning of his expressions, or of his motive in using them. (1 Starkie on Evid. *208; *Clark v. Vorce*, 15 Wend. 193, 196.) Even if the cross-examination has been as to facts not admissible in evidence, the rule seems to be that the witness may be re-examined as to evidence so given. (1 Greenl. on Evid. sec. 468; 2 Phillips on Evid. *973; *Blewett v. Tregonning*, 3 Ad. & El. 554.) In this case the additional reason exists that the request for the actual conversation, as to which the witness had been cross-interrogated, was proper, in order to rebut the inference suggested concerning the motives of the witness. The re-examination of a witness is, largely, in the discretion of the court. The proper limitations upon it are that it shall relate to the subject-matter of the cross-examination and bear upon the question at issue. He cannot be asked as to new matter. (Powell on Evid. 529.) The reasoning, with respect to the right of the prosecution to re-examine a witness as to matters opened up upon his cross-examination, is applicable to other exceptions. In the case of the witness, Macomber, the cross-examination has been directed, largely, to destroying the effect of his testimony and to impairing his value as a witness, by showing him to be unworthy in character for betraying his friend, and statements made to reporters of his suspicions as to defendant's guilt were brought out. The cross-examination had taken a very wide range of subjects. The prosecution was justified in negating the imputations, or inferences, the defendant might claim to be deducible from the facts elicited. It was competent to elicit an explanation of the reasons of the witness and the

source of the information on which his statements were based. Having entered upon that line of examination, the defense may not complain of its being pursued by the People, in order that the jury might be able to judge for themselves as to the character and motives of the witness. It all bore in some degree upon his character for credibility. So, when the defense brought out portions of a conversation between the witness and a man named Doria, in which the latter told of the defendant's having seduced his (Doria's) wife before their marriage, the People were at liberty to call for the whole conversation. It seems that Doria's suspicions had become aroused about the defendant, from what he had heard him threaten, and he communicated them to Macomber. The defendant tried to show Doria was actuated by revenge; but they opened the door for the whole conversation.

Objection was taken to the introduction in evidence of the will of the deceased, made three days before her marriage with the defendant. It was, however, a piece of material evidence, competent and relevant upon the question of motive. Before marriage he was only a possible legatee; but upon marriage he would become the certain legatee, if she were to die without any change made in the will. In like manner, the deed of the Newark property, made to the defendant a few days after marriage, and the deed to Knight, made by the defendant in September, 1892, after his indictment for the crime, were competent upon the question of motive. The will showed the existence of an inducement to marriage. The deed, made a few days after marriage, showed the defendant's desire to obtain the property. The deed after death tended to show the realization and consummation of the defendant's scheme. The evidence was relevant to show that the formed intention to be possessed of the estate of his deceased wife was accomplished by securing the fruits of his crime. It is, moreover, difficult to see how the introduction of the deed could possibly prejudice him.

Exception was taken to the rulings of the trial judge, which permitted Macomber to testify to conversations had between

the defendant and Knight, a lawyer in Newark, and Davison, a lawyer in New York. Communications between counsel and client are, as between themselves, protected from disclosure; but if heard by another, in whose presence they are made, the confidential character is gone. (*Jackson ex dem., etc., v. French*, 3 Wend. 337; *Hoy v. Morris*, 13 Gray, 519.) The reason is obvious. A communication intended to be confidential should not be made in the hearing of a third person; unless that person stood in a peculiar relation of confidence; which was not the case with Macomber. He did not know of the crime and he simply took the defendant to see a lawyer, because his friend was alarmed by the newspaper comments and charges. The protection extended by the statute to communications between attorney and client is intended to cover those which the relation calls for and are supposed to be confided to the lawyer, to guide him in giving his professional aid and advice. I am not aware of any extension of the rule, which would protect the revelation of confidences made to a friend, or to a lawyer in the presence of a friend.

The witness Ellison, an experienced apothecary, was permitted to make up the prescriptions given by Dr. McIntyre. He described its taste as being salty and then put four grains of morphine in a teaspoonful of the prescribed medicine and described it as bitter in taste. He showed that two grains of morphine were dissolved in one teaspoonful and the residue in a second teaspoonful. The evidence was relevant, in view of the testimony of Mrs. Brockway and the nurse, that they saw defendant giving his wife some liquid from a phial; that upon taking it she made a wry face and bit, or sucked from, an orange, and that in a few minutes she sank into a profound sleep, which ended in a state of coma. As the theory of the prosecution was that morphine was then given, it was competent to show, by one experienced in the art, how the morphine could be combined with the prescription of the physician; that there would be no change in color; that the taste would be bitter, and that it was necessary for the defendant to give two teaspoonfuls in order to dispose of that quantity of the drug.

The defendant insists upon the existence of error in many rulings of the recorder, under which Macomber and other witnesses were permitted to give in evidence declarations by him during his married life, which reflected upon his wife, or exhibited his feelings towards her, or showed a desire to be rid of her. It is argued that they had no bearing on the question of motive, and, as to some of them, that they were not made at the time of the alleged poisoning. The admissibility of such evidence was discussed in *People v. Harris* (*supra*). It was there said that "proof of the existence of the element of motive is aided, in some degree, by showing what were the defendant's relations and feelings towards his wife, as evidenced by his conduct and remarks when with others." I think all such evidence is clearly relevant upon the question of motive and tends to rebut that strong presumption from the marital relation, which militates in favor of the husband when accused of the murder of his wife. The evidence was, also, admissible, which bore upon the defendant's conduct at or about the time of death and afterwards. It showed his indifference to his wife and a gratification at being rid of her, which immediately displayed itself in ways of unbridled license and of singular disregard of decency.

The will, the precipitate and secret marriage with a woman of so unsavory a reputation and the deeding of the property soon afterwards, with the sudden death within eighteen months, were opening and closing scenes in a drama, which required to be filled in by proof; in order to understand the parts played by the defendant and his wife and to enable the jury to judge of his innocent or guilty participation in the dénouement. Any declarations or admissions by him, which would tend to exhibit how he performed his part as a husband, or to indicate his sentiments towards her, were properly admitted. If they showed a purpose to obtain her property, inaugurated by the marriage; a repugnance or indifference to her afterwards, which created a desire to get rid of her; or the final promotion of a purpose, (if it had not always existed), to destroy her life, in order to secure his freedom

and the enjoyment of her property; they were material and relevant to the issue of the defendant's guilt.

I think that no error was committed in ruling upon the sixty-three requests to charge, propounded to the recorder. After all the evidence was in and after the district attorney, in response to a request by the defendant, had elected to go to the jury upon the second count of the indictment, a motion was made to strike out all the testimony on the subject of morphine, which was the substance of the charge in the first count. The motion was properly denied. The first count had charged the act to have been committed by giving "a deadly poison called morphine;" while the second count charged its commission by giving "a certain deadly poison to the grand jury unknown." All the evidence, which would fit the charge in the first count, would be competent and relevant under the second count and tend to prove its charge. The chemical experts testified that they were employed to examine the corpse "for the purpose of detecting the presence of poisons, in any form of poison." They did discover the presence of morphine and of a substance acting as atropine would act; as the result of an analysis of the residues from the body and by certain characteristic re-actions from tests applied to them. The medical practitioners, upon the hypothetical question, gave it as their opinion from the symptoms that death was caused by the use of the two drugs morphine and atropine. It is true that morphine poisoning was originally suspected as the cause of death; but, when the grand jury found the indictment, the chemists had not reported the result of their investigations into the causes of death, and the grand jury, obviously, could not charge with exactness. They, therefore, charged in separate counts the commission of the same act in different ways. It can hardly be said that it was charged in a different manner; for the substance of the charges was the administering of poison and the evidence to prove the particular charge would be relevant to establish the general charge. The charge in the second count resumed that of the first. An indictment would not be affected because the

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proof established the commission of the crime by different means than what had been charged. That has long been the rule. In Hale's Pleas of the Crown (2d vol. 185) it is said: "If A be indicted for poisoning B, it must allege the kind of poison; but if he poisoned B with another kind of poison, yet it maintains the indictment for the kind of death is the same." (And see *People v. Colt*, 3 Hill. 432.)

After the jury had retired, an incident occurred, which has been made much of and which constituted the basis, in part, of a motion for a new trial. The jury retired in the afternoon of April 25th. In the evening of the day following, they were taken over to a hotel for their dinner. Paradise, one of their number, was taken suddenly ill and fainted. A physician was called in, who found him first unconscious and then delirious. He had him removed to another room, where he treated him professionally. A report of the occurrence was made to the recorder; who sent for and examined the attending physician, in the presence of the district attorney and of the defendant's counsel. He gave a description of what had taken place and of what he had done. He gave his opinion that the attack had been caused by the mental strain and he thought the juror might be able to come to the court after a while. Later in the evening, the juror, having improved, was brought over and took his seat, with his associates, in the jury box. It appeared that they had agreed upon a verdict before the illness; but the recorder thought it inadvisable, under the circumstances, to then receive their verdict; advising them to again retire and confer. They did so and shortly returned with their verdict. Upon the facts, as they were made to appear, there was nothing to warrant the trial judge in refusing to receive the verdict.

Subsequently, however, upon the hearing of the motion for a new trial, certain other facts were made to appear, which we have considered carefully, with the view of ascertaining whether they furnish any sufficient reason for believing that the verdict of the jury was not properly or fairly reached. One branch of the motion was based on the ground that there

had been an illegal separation of the jurors. Affidavits were read, showing that upon the removal of the sick juror from the room, in which he and his fellow jurors were dining together, the other jurors separated; some running to and from the sick man's room and others going in other directions and alone. In opposition were read the affidavits of the jurors and of the court officers; to the effect that the jurors were always in charge of the officers; that none of them were ever alone and that no communication was had with them by any person in reference to the case. Upon these proofs, it was discretionary with the trial court to order a new trial, or not, and with the exercise of its discretion we will not interfere. (Code Crim. Proc. sec. 465, subd. 3.) It was a question of fact and I think the judicial discretion of the learned recorder was well exercised, in having regarded the involuntary separation of the jurors as working no possible prejudice to the defendant. The second branch of the motion for a new trial was based on the ground that the attack, which the juror, Paradise, suffered from, was an expression of a generally deranged judgment and that his mind could not have been clear and sound, or capable of judgment, for some hours before and after. In support of that ground, the affidavits of several distinguished physicians and alienists were produced and read. It was their opinion, upon the statement of the physician, who attended the said juror, of the juror's son and of others, detailing what had occurred, that the attack was epileptic in character. They, in substance, thought it evidenced a confirmed epileptic condition and indicated a mental disturbance, which must have existed for several hours and must have rendered his mental action unreliable and valueless. In opposition to these opinions, were read affidavits by several other physicians, expert in mental diseases, who had made a personal examination of the juror and who gave it as their opinion that there was no perceptible indication of epilepsy, or of paresis, and that he was in full possession of his faculties. Upon Paradise's statements as to his past life, they were of the opinion that he had never

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suffered from epilepsy or insanity. They thought the symptoms of his attack were those of nervous exhaustion and of hysteria, induced by the close confinement and the long-continued strain upon him in the performance of his duties of a juror. His own affidavit was read, denying ever having suffered from epileptic attacks. He narrated the occurrences in the jury room and stated that after the first ballot, when he had voted "not guilty," he had upon each subsequent ballot voted "guilty" and that the jury had agreed upon their verdict before they went to the hotel for their meal. He stated that he felt well when he came back to court and was able to deliberate. He gave the facts about his past life and he showed that the day after the conclusion of the trial he had gone away on business and remained away till June, being in the full possession of his health and faculties. The affidavits of physicians, who had known and attended him in the past, stated that he had never manifested any epileptic symptoms, or any form of nervous disease. Other affidavits, by his employer and by his fellow jurors, were read to show his mental competency.

The recorder, in denying a new trial, had before him the conflicting opinions of the experts, the facts stated in the affidavits and those within his own observation. It cannot be said that the defendant made out a case of mental incompetency in the juror. While the opinions of the physicians, secured by him, seemed to give support to his theory of a mental or nervous disease in the juror, which incapacitated him to deliberate or confer upon his case, they were not based upon any personal examination, but were premised upon the statements given them. In view of the evidence as to his physical and mental condition upon actual examination, as to the facts of his past life and of his condition for weeks after the trial, the learned recorder could not well have decided otherwise than he did and I think we must agree with him that the opinions of the experts for the People were warranted by the evidence and that those of the defendant's experts were not.

The elaborate opinion, which he delivered upon the denial of the motion for a new trial, contains a conscientious and able review of the question and is perfectly satisfactory.

I find no other questions demanding our consideration and, after the most patient consideration of the extended briefs of counsel and of this extraordinarily large record, covering a trial of over a month and the subsequent proceedings upon the motion for a new trial, my conclusion is that the defendant had a just and fair trial and that we should affirm the judgment of conviction appealed from.

All concur.

Judgment affirmed. _____

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THE HEALTH DEPARTMENT OF THE CITY OF NEW YORK,
Appellant, v. THE RECTOR, CHURCH WARDENS AND VESTRY-
MEN OF TRINITY CHURCH in the City of New York,
Respondent.

The legislature, in the exercise of its power to conserve the public health, safety or welfare, may direct that certain improvements or alterations shall be made in existing houses at the owners' expense, and while the requirement must not be unreasonable, either with reference to its nature or cost, yet, when it clearly appears that it tends, in some plain and appreciable manner, to guard and protect the public in the respects specified; that it bears equally upon all members of the same class, and that the cost will not be unreasonable, considering the character of the work required, with reference to the object to be attained, the requirement is constitutional and valid.

It is not requisite to the validity of a legislative enactment of a police nature, which may disturb the enjoyment of individual rights, that provision for compensation for such disturbance be made, where the act does not appropriate private property, but simply regulates its use and enjoyment by the owner.

The provision of the New York Consolidation Act (§ 663, chap. 410, Laws of 1882, amended by chap. 84, Laws 1897), declaring that tenement houses in the city previously erected shall be furnished by the owners with water, "when they shall be directed so to do by the board of health, in sufficient quantity at one or more places on each floor occupied or intended to be occupied by one or more families," is a proper exercise of the police power of the state, both as a guard to the public health and as a protection against fire, and is constitutional. (BARTLETT, J., dissenting.)

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The language of the provision requiring the supply of water to be "in sufficient quantity at one or more places on each floor" does not leave the number of places of supply entirely to the discretion of the board of health; one place on each floor, if it can be made fairly accessible to all the occupants of the floor, is all that can be required. (BARTLETT, J., dissenting.)

The health department of said city caused to be served on defendant's agent a notice requiring it to provide "suitable appliances to receive and distribute a supply of water for domestic use" on the floors specified of two buildings owned by it, within a time specified. In an action to recover penalties imposed by the act for a failure to comply with said notice, defendant claimed that the houses in question were not tenement houses within the meaning of the act. They were houses constructed many years ago as dwelling houses, each with two stories, an attic and basement, and their internal arrangements had not been altered; one of the houses, however, was occupied by three families, the other, by six. *Held*, that the claim was untenable.

Defendant offered evidence on the trial as to the necessary cost of complying with the order; also, that the introduction of the appliances called for with the necessary sinks and waste pipes would cause great danger of injury to the property through the freezing of the water in the pipes in the winter season, and that no complaints in reference to the want of water had been made to defendant by the occupants of the buildings. This evidence was objected to and excluded. *Held*, no error.

Defendant set up as a defense that the order could not be complied with except by the expenditure of considerable money, and as the order was made without notice its effect was to deprive defendant of its property without a hearing or opportunity to present any defense, and so that it deprived defendant of its property without due process of law. *Held*, untenable.

Defendant claimed that the statutory provision does not authorize the notice given requiring appliances to furnish "a supply of water for domestic use." *Held*, untenable; that the provision necessarily requires some appliances to supply the water; and that it was within the intent of the provision to provide water for the use of the families occupying the tenement houses, and this necessarily includes a sufficient supply for domestic use.

(Argued January 15, 1895; decided February 26, 1895.)

APPEAL from order of the General Term of the Court of Common Pleas for the city and county of New York, made January 4, 1892, which sustained exceptions taken by defendant to a verdict in favor of plaintiff directed by the court and granted a new trial.

The action was brought by the plaintiff, by virtue of several acts of the legislature giving it power in certain cases to commence an action in its own name, for the purpose of recovering the amount of \$200, being the penalty for twenty days violation by the defendant of the act hereinafter mentioned, relative to the supply of water in several tenement houses owned by the defendant. The defendant denied some of the allegations of the complaint, and set up also, as one of the defenses to the action, that the statute upon which the complaint is founded is unconstitutional. Each party moved after the evidence was in that a verdict be directed in its favor. The motion on the part of the plaintiff was granted, and that on the part of the defendant was denied. The defendant excepted to these decisions, and the court directed defendant's exceptions to be heard in the first instance at the General Term and that judgment upon the verdict for the plaintiff be in the meantime suspended. The General Term sustained defendant's exceptions and made an order granting a new trial and from that order the plaintiff appeals here.

The cause of action is founded upon section 663 of the Consolidation Act relating to the city of New York, as such section was amended by chapter 84 of the Laws of 1887. After making various provisions in prior sections for the proper construction and ventilation of tenement houses in the city of New York, the legislature, by the amendment of 1887, enacted as follows :

"§ 663. Every such house erected after May 14th, 1867, or converted, * * * shall have Croton or other water furnished in sufficient quantity at one or more places on each floor, occupied or intended to be occupied by one or more families ; and all tenement houses shall be furnished with a like supply of water by the owners thereof whenever they shall be directed so to do by the board of health. But a failure in the general supply of water by the city authorities shall not be construed to be a failure on the part of the owner, provided that proper and suitable appliances to receive and distribute

such water are placed in said house. Provided, that the board of health shall see to it that all tenement houses are so supplied before January first, eighteen hundred and eighty-nine."

The rest of the section is not material.

It appeared upon the trial that the defendant was the owner of certain houses in the city of New York known as numbers 59, 77, 84 and 86 Charlton street, and on the 20th of March, 1891, the plaintiff caused to be served on the agent of the defendant a notice requiring the defendant in conformity with the provisions of the Sanitary Code, to alter, repair, cleanse and improve the premises above mentioned, and directing that suitable "appliances to receive and distribute a supply of water for domestic use be provided on the top floor of No. 59, the basement, first and second floors of No. 77, the basement, first, second and third floors of No. 84, and the basement and attic of 86;" and the defendant was required to comply with the requirements within five days from the receipt of the notice, and it was also stated in the notice that any application for a necessary extension of time or for the suspension of any part of the requirements contained in the written notice should be made to the health department at the time and place designated in the notice. This action was brought against defendant as owner of houses Nos. 77 and 84 Charlton street. The defendant claims that the houses in question were not tenement houses as that word is popularly used; that they were houses constructed many years ago as dwelling houses, and they have never been altered with reference to their internal arrangement so as to convert them into what would popularly be called tenement houses. They were old-fashioned dwelling houses, two-story, attic and basement. There were hydrants in the back yards accessible to all tenants of the houses; but the proof in the case shows that at No. 77 Charlton street there were three families, and in No. 84 there were six families, and the houses came clearly and distinctly under the definition of tenement houses, as enacted by section 666 of the Consolidation Act, as amended by the Laws of 1887 (Chap. 84, p. 100). It is claimed on the part of the defendant that the buildings are in

a transition neighborhood which will be shortly required for business structures; that they are not in a neighborhood where all or many of the large buildings which are known as tenement houses in the popular meaning of the word are situated, and that these houses are not really within the reason of the statute. The defendant offered on the trial to give testimony as to the necessary cost of complying with the order of the board of health, which was excluded, and the defendant excepted. Defendant also offered to prove that the introduction of appliances to furnish water on each floor, and the required sinks and waste pipes to connect with the sewer, would cause great danger of injury to the property through the water in the pipes freezing and the pipes bursting in the winter season; also that no complaints had been made to the defendant corporation by the occupants of these houses in reference to the want of water. All this evidence was excluded under the objection of the plaintiff and upon the exception of the defendant.

The General Term of the Common Pleas granted leave to plaintiff to appeal from its order granting a new trial on the ground that a question of law was involved which ought to be reviewed by this court.

Roger Foster for appellant. The statute is a lawful exercise of the police power both for the protection of the health of the community and protection against fire. (Laws of 1884, chap. 448; *Comm. v. Roberts*, 155 Mass. 281; *Bancroft v. Cambridge*, 126 id. 438; *Trair v. B. D. Co.*, 144 id. 523; *Comm. v. Abbott*, 160 id. 282; *In re Paul*, 94 N. Y. 497; *People v. King*, 110 id. 418; *People v. Budd*, 117 id. 1; *In re Jacobs*, 98 id. 98; *People v. Ewer*, 141 id. 129; *Ex parte Fiske*, 72 Cal. 125; *Wadleigh v. Gilman*, 12 Maine, 403; *King v. Davenport*, 98 Ill. 305; *Allen v. Taunton*, 19 Pick. 485.) An abundant and accessible supply of water is a necessity for the protection of the health of the community and for protection against fire; and is always the subject of police regulations. (*State v. City of Toledo*, 48 Ohio St.

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112; *Lombard v. Stearns*, 4 Cush. 60.) It is not a taking of property to compel an owner to improve or alter the condition of his property although he is thereby put to some expense. (*Thorpe v. R. & B. R. R. Co.*, 27 Vt. 140; *M. & S. R. Co. v. Emmons*, 149 U. S. 364; *N. Y. & N. E. R. R. Co. v. Bristol*, 151 id. 556; *People ex rel. v. B. & A. R. R. Co.*, 70 N. Y. 569; *C. C. & A. R. R. Co. v. Gibbes*, 142 U. S. 386; *People v. Budd*, 117 N. Y. 1; *In re Goddard*, 16 Pick. 504; *Davidson v. City of New Orleans*, 96 U. S. 97, 106; *Wurts v. Hoagland*, 114 id. 606; *Donnelly v. Debuer*, 58 Wis. 461; *Norfleet v. Cromwell*, 70 N. C. 634; *Anderson v. Kerns*, 14 Ind. 199; *O'Reilly v. K. V. D. Co.*, 32 id. 169; *Draining Comrs. Case*, 11 La. Ann. 338; *Williams v. Mayor, etc.*, 2 Mich. 560; *Sessions v. Crinkleton*, 20 Ohio St. 349; *Dingley v. City of Boston*, 100 Mass. 544; *Bancroft v. City of Cambridge*, 126 id. 438; *Hadgar v. Suprs.*, 47 Cal. 222; *French v. Kirkland*, 1 Paige, 117; *Phillips v. Wickham*, Id. 590; *Woodruff v. Fisher*, 17 Barb. 224; *Vanderbilt v. Adams*, 7 Cow. 349; *Wadleigh v. Gilman*, 12 Maine, 403; *Cordes v. Miller*, 39 Mich. 581; *Mugler v. Kansas*, 123 U. S. 623; *Rideout v. Knox*, 148 Mass. 368.) The General Term erred in supposing that they were bound by the evidence on the trial, and must determine from it alone, whether the statute tended to promote the health of the residents in the houses. (*Walnut v. Wade*, 103 U. S. 683.) The act is not unconstitutional because of its failure to expressly direct that the owner of a tenement shall be given notice and a hearing before he is ordered to connect his building with the Croton water pipes. (*Stuart v. Palmer*, 74 N. Y. 183; *Spencer v. Merchant*, 100 id. 585; *C. & G. T. R. Co. v. Wellman*, 143 U. S. 339.) If notice was necessary it will be presumed that it was given. (*Paulser v. Portland*, 149 U. S. 30.) The order was sufficient. (Laws of 1882, chap. 410, § 663.) In case of doubt the court will sustain the constitutionality of the statute. (*People v. Budd*, 117 N. Y. 1, 29.) Should this court be of the opinion that, on account of any technical insufficiency in

the proof there was error upon the trial, we urge that it express its opinion on the constitutionality of the statute, in order that the public health may no longer suffer by the inability of the plaintiffs to enforce it. (*People ex rel. v. D'Oench*, 111 N. Y. 359, 361; *Minor v. Happersett*, 21 Wall. 162.)

S. P. Nash for respondents. The acts of the legislature which impose the duty of supplying water on each floor of the houses described cannot be sustained as a proper exercise of police power. (*Village of Carthage v. Frederick*, 122 N. Y. 268; *People v. Gilson*, 109 id. 389; *People v. Marx*, 99 id. 377; *People v. Arensberg*, 125 id. 123; *In re Jacobs*, 98 id. 98; *City of Rochester v. Simpson*, 57 Hun, 36.) It is sometimes said that legislation which is ostensibly in the interest of public health will be presumed to be so. This is not a legal presumption, and all that can reasonably be meant by it is that the courts will not declare laws supposed to have been passed in the proper exercise of the police power unconstitutional, unless it is plain that they are not within such power. (*In re Jacobs*, 98 N. Y. 98; 128 id. 55; Laws of 1882, chap. 410, § 663; Laws of 1893, chap. 189.) But assuming that the legislation is valid, and that the houses in question are within its terms, the penalties imposed were not recoverable. (*People v. Bd. of Health*, 58 Hun, 595.) That the general effect of the legislation under consideration is simply to take the property of one person for the benefit of another is apparent from the uses to which the penalties imposed are to be devoted. (Laws of 1882, chap. 410, §§ 194, 665.) The legislation under review is a burden imposed upon landlords for the ease and comfort of tenants and clearly in violation of constitutional guaranties. (*Foster v. Scott*, 136 N. Y. 577.)

PECKHAM, J. The recovery in this case is founded upon that portion of the Consolidation Act which requires that all houses of a certain description, upon the direction of the board of health, shall be provided with Croton or other water in

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sufficient quantity at one or more places on each floor, occupied, or intended to be occupied, by one or more families. The defendant, among other things, alleges as a defense that the order of the board of health directing the defendant to furnish the water as provided by the statute was made without notice to it, and that, as it could not be complied with excepting by the expenditure of a considerable amount of money, the result would be to deprive the defendant of its property without a hearing and an opportunity to show what defense it might have, and that it in fact deprived the defendant of its property without due process of law. There was no arrangement in either of these houses in question for the supplying of the Croton or other water to the occupants of each floor at the time when the order of the board of health was made; such order could not, therefore, be complied with on the part of the defendant without the expenditure of money for that purpose. That fact must be assumed, and even upon that assumption we do not think the act is invalid on the alleged ground that it deprives the defendant, if enforced, of its property without due process of law. The act must be sustained, if at all, as an exercise of the police power of the state. It has frequently been said that it is difficult to give any exact definition which shall properly limit and describe such power. It must be exercised subject to the provisions of both the Federal and State Constitutions, and the law passed in the exercise of such power must tend in a degree that is perceptible and clear towards the preservation of the lives, the health, the morals or the welfare of the community, as those words have been used and construed in many cases heretofore decided. Numerous cases have arisen in this state where the power of the legislature was questioned, and where the exercise of that power was affirmed or denied for the reasons given therein. (See *People v. Marx*, 99 N. Y. 377; *Matter of Jacobs*, 98 id. 98; *People v. Gillson*, 109 id. 389; *People v. Arensberg*, 105 id. 123, and many cases cited in these cases. See, also, *Slaughter House Cases*, 16 Wall. 36, 62; *Barbier v. Connolly*, 113 U. S. 27; *Gas Co. v. Light Co.*,

115 id. 650; *Boston Beer Co. v. Massachusetts*, 97 id. 25.) The act must tend in some appreciable and clear way towards the accomplishment of some one of the purposes which the legislature has the right to accomplish under the exercise of the police power. It must not be exercised ostensibly in favor of the promotion of some such object while really it is an evasion thereof and for a distinct and totally different purpose, and the courts will not be prevented from looking at the true character of the act as developed by its provisions by any statement in the act itself or in its title showing that it was ostensibly passed for some object within the police power. The court must be enabled to see some clear and real connection between the assumed purpose of the law and the actual provisions thereof, and it must see that the latter do tend in some plain and appreciable manner towards the accomplishment of some of the objects for which the legislature may use this power.

First. Assuming that this act is a proper exercise of the power in its general features we do not think that it can be regarded as invalid because of the fact that it will cost money to comply with the order of the board for which the owner is to receive no compensation or because the board is entitled to make the order under the provisions of the act without notice to and a hearing of the defendant. As to the latter objection it may be said that in enacting what shall be done by the citizen for the purpose of promoting the public health and safety it is not usually necessary to the validity of legislation upon that subject that he shall be heard before he is bound to comply with the direction of the legislature. (*People ex rel. v. Board of Health*, 140 N. Y. 1, 6.) The legislature has power and has exercised it in countless instances to enact general laws upon the subject of the public health or safety without providing that the parties who are to be affected by those laws shall first be heard before they shall take effect in any particular case. So far as this objection of want of notice is concerned the case is not materially altered in principle from what it would have been if the legislature had enacted a general law that all own-

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ers of tenement houses should, within a certain period named in the act, furnish the water as directed. Indeed, this act does contain such a provision, but the plaintiff has not proceeded under it. If in such case the enforcement of the direct command of the legislature were not to be preceded by any hearing on the part of any owner of a tenement house, no provision of the State or Federal Constitution would be violated. The fact that the legislature has chosen to delegate a certain portion of its power to the board of health, and to enact that the owners of certain tenement houses should be compelled to furnish this water after the board of health had so directed, would not alter the principle, nor would it be necessary to provide that the board should give notice and afford a hearing to the owner before it made such order. I have never understood that it was necessary that any notice should be given under such circumstances before a provision of this nature could be carried out.

As to the other objection, no one would contend that the amount of the expenditure which an act of this kind may cause, whether with or without a hearing, is within the absolute discretion of the legislature. It cannot be claimed that it would have the right, even under the exercise of the police power, to command the doing of some act by the owner of property and for the purpose of carrying out some provision of law, which act could only be performed by the expenditure of a large and unreasonable amount of money on the part of the owner. If such excessive demand were made the act would without doubt violate the constitutional rights of the individual. The exaction must not alone be reasonable when compared with the amount of the work or the character of the improvement demanded. The improvement or work must in itself be a reasonable, proper and fair exaction when considered with reference to the object to be attained. If the expense to the individual under such circumstances would amount to a very large and unreasonable sum, that fact would be a most material one in deciding whether the method or means adopted for the attainment of the main object were or were not an unreason-

able demand upon the individual for the benefit of the public. Of this the courts must, within proper limits, be the judges. We may own our property absolutely and yet it is subject to the proper exercise of the police power. We have surrendered to that extent our right to its unrestricted use. It must be so used as not improperly to cause harm to our neighbor, including in that description the public generally. There are sometimes necessary expenses which inevitably grow out of the use to which we may put our property and which we must incur, either voluntarily or else under the direction of the legislature, in order that the general health, safety or welfare may be conserved. The legislature, in the exercise of this power, may direct that certain improvements shall be made in existing houses at the owners' expense, so that the health and safety of the occupants and of the public through them may be guarded. These exactions must be regarded as legal so long as they bear equally upon all members of the same class and their cost does not exceed what may be termed one of the conditions upon which individual property is held. It must not be an unreasonable exaction either with reference to its nature or its cost. Within this reasonable restriction the power of the state may, by police regulations, so direct the use and enjoyment of the property of the citizen that it shall not prove pernicious to his neighbors or to the public generally. The difference between what is and what is not reasonable, frequently constitutes the dividing line between a valid and void enactment by the legislature in the exercise of its police power. In commenting on the difference of degree in any given case which would render an act valid or otherwise, Mr. Justice HOLMES, in *Rideout v. Knox*, speaking for the Supreme Court of Massachusetts, said: "It may be said that the difference is only one of degree; most differences are when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the legislature to exercise police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; larger

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ones could not be except by the exercise of the right of eminent domain." (148 Mass. 368, 372. See, also, *Miller v. Horton*, 152 id. 540, at 547.) The case of *Stuart v. Palmer* (74 N. Y. 183) is an example of the exercise of the taxing power of the state and other considerations obtain in such cases.

Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffer injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure. (1 Dillon on Mun. Corp. [4th ed.] sec. 141 and note 2; *Com. v. Alger*, 7 Cush. 83, 84, 86; *Baker v. City of Boston*, 12 Pick. 184, 193; *Clark v. Mayor of Syracuse*, 13 Barb. 32, 36.) The state, or its agent in enforcing its mandate, takes no property of the citizen when it simply directs the making of these improvements. As a result thereof the individual is put to some expense in complying with the law, by paying mechanics or other laborers to do that which the law enjoins upon the owner, but so long as the amount exacted is limited as stated, the property of the citizen has not been taken in any constitutional sense without due process of law.

Instances are numerous of the passage of laws which entail expense on the part of those who must comply with them and where such expense must be borne by them without any hearing or compensation because of the provisions of the law. (*Thorpe v. R. R. Co.*, 27 Vt. 140-152.) One of the late instances of this kind of legislation is to be found in the law regulating manufacturing establishments. (Laws of 1887, chap. 462.) The provisions of that act could not be carried out without the expenditure of a considerable sum by the owners of a then existing factory. Hand rails to stairs, hoisting shafts to be inclosed, automatic doors to elevators, automatic shifters for throwing off belts or pulleys, and fire

escapes on the outside of certain factories, all these were required by the legislature from such owner and without any direct compensation to him for such expenditure. Has the legislature no right to enact laws such as this statute regarding factories unless limited to factories to be thereafter built? Because the factory was already built when the act was passed, was it beyond the legislative power to provide such safeguards to life and health as against all owners of such property unless upon the condition that these expenditures to be incurred should ultimately come out of the public purse? I think to so hold would be to run counter to the general course of decisions regarding the validity of laws of this character and to mistake the foundation upon which they are placed. (*Coates v. Mayor, etc.*, 7 Cowen, 585, 604; *Cooley's Const. Lim.* [5th ed.] chap. 16, page 706, etc.)

Any one in a crowded city who desires to erect a building is subject at every turn almost to the exactions of the law in regard to provisions for health, for safety from fire and for other purposes. He is not permitted to build of certain materials within certain districts because though the materials may be inexpensive they are inflammable, and he must build in a certain manner. Theaters and hotels are to be built in accordance with plans to be inspected and approved by the agents of the city; other public buildings also; and private dwellings within certain districts are subject to the same supervision, and in carrying out all these various acts the owner is subjected to an expense much greater than would have been necessary to have completed his building if not compelled to complete it in the manner, of the materials and under the circumstances prescribed by various acts of the legislature. And yet he has never had a hearing in any one of these cases, nor does he receive any compensation for the increased expense of his building, rendered necessary in order to comply with the police regulations. I do not see that the principle is substantially altered where the case is one of an existing building and it is to be subjected to certain alterations for the purpose of rendering it either less exposed to the danger from fires or

its occupants more secure from disease. In both cases the object must be within some of the acknowledged purposes of the police power and such purpose must be possible of accomplishment at some reasonable cost, regard being had to all the surrounding circumstances. There might at first seem to be some difference as to the principle which obtained in enacting conditions upon complying with which the owner might be permitted to erect a structure within the limits of a city or village or for certain purposes, and the enactment of provisions which would necessitate the alteration of structures already in existence. In the first case it might be urged that the discretion of the legislature in enacting conditions for building might be more extensive, because the owner would be under no necessity of building; it would be a matter of choice and not of compulsion, and in choosing to build it might be said that he accepted the condition, while in the second case he would have no choice and would be compelled to alter or improve the existing building as directed by the law. The difference, however, is, as it seems to me, really not one of principle, but only of circumstances. Although the owner in the one case is not compelled to build, yet he is limited in the use to which he may put his property by the provisions of the law. He cannot build as he wishes to, unless upon the condition of a compliance with the law, and he may very probably be so situated as to location of property, and in other ways, that it is really a necessity for him to use his property in the way proposed, and which he cannot do without expending considerable sums above what he otherwise would be called upon to do in order to comply with those provisions. They must, therefore, be reasonable, as already stated. When one's use of his property is thus circumscribed and limited, what might otherwise be called his rights are plainly interfered with, and the justification therefor can only be found in this police power. So, when the owner of an existing structure is called upon to make such alterations, while the necessity may seem to be more plainly present, still it may exist in both cases, and the only justification in either is the same.

Under the police power persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort and health of the public.

The citizen cannot, under this act, be punished in any way, nor can any penalty be recovered from him for an alleged non-compliance with any of its provisions or with any order of the board of health without a trial. The punishment or penalties provided for in section 665 cannot be enforced without a trial under due process of law, and upon such trial he has an opportunity to show whatever facts would constitute a defense to the charge; to show, in other words, that he did not violate the statute or the order of the board or that the statute itself or the order was unreasonable and illegal. He might show that the house in question was not a tenement house within the provision of the act, or that there was a supply of water as provided for by the act, or any other fact which would show that he had not been guilty of an offense with regard to the act. (*City of Salem v. R. R. Co.*, 98 Mass. 431, 447.)

The mere fact, however, that the law cannot be enforced without causing expense to the citizen who comes within its provisions furnishes no constitutional obstacle to such enforcement even without previous notice to and a hearing of the citizen. What is the propriety of a hearing and what would be its purpose? His property is not taken without due process of law, within any constitutional sense when the enforced compliance with certain provisions of the statute may result in some reasonable expense to himself. Any defense which he may have is available upon any attempt to punish him or to enforce the provisions of the law.

An act of the legislature of Massachusetts which provided that every building in Boston used as a dwelling house, situated on a street in which there was a public sewer, should have sufficient water closets connected therewith, was held valid as to existing houses and applied in its penalties to their owners, if such houses continued without the closets after its passage. (*Commonwealth v. Roberts*, 155 Mass. 281, and see *Train v. Disinfecting Co.*, 144 id. 529.) No notice or

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hearing was provided for in the above statute as to water closets before the act could be enforced, and yet to enforce it would, of course, cost the owner of the building some money. The same may be said as to the disinfecting of the rags, in above case in 144 Mass. If the citizen be charged with any violation of such a statute, and any penalty or punishment is sought or attempted, then is the time for a hearing and then is the time he can make defense if any he may have. But to assert that he must be heard before the authorities assume or endeavor to act under and to enforce the law as against him, is to say, in substance, that each citizen is to be heard upon the general question whether it is right to enforce the law in his particular case. This is not to be permitted. (*Com. v. Alger*, 7 Cush. 53, 104; *City of Salem v. R. R. Co.*, 98 Mass. 431, 443.) Everything that the individual could urge upon the hearing if given prior to the attempted enforcement of the act by the making of the order in question can be said by him when he is sued, or when the attempt is made to punish him for the alleged violation of the law. Upon the prior hearing, if granted, it would be no defense to him if he showed that the law could not be complied with unless at some reasonable expense to himself. That would have been matter to urge upon the legislature prior to the enactment of the statute, as a question of reasonable cost and of public policy. (*R. R. Co. v. Com.*, 79 Me. 386, 393; *The State v. R. R. Co.*, 83 Mo. 144-149; *Thorpe v. R. R.*, 27 Vt. 140, 149, 156, note.)

We do not think that the cost of making the improvements called for by this act exceeds the limits which have been defined, assuming the amount thereof which the defendant offered to prove.

This is not the case of a proceeding against an individual on the ground of the maintenance of a nuisance by him, nor is it the case of an assumed right to destroy an alleged nuisance without any other proof than the decision of the board itself (with or without a hearing) that the thing condemned was a nuisance. Nor is it the case of the destruction

of property which is in fact a nuisance, without compensation. Where property of an individual is to be condemned and abated as a nuisance it must be that somewhere between the institution of the proceedings and the final result the owner shall be heard in the courts upon that question, or else that he shall have an opportunity when calling upon those persons who destroyed his property to account for the same, to show that the alleged nuisance was not one in fact. No decision of a board of health, even if made on a hearing, can conclude the owner upon the question of nuisance. (*People ex rel v. Board of Health of Yonkers*, 140 N. Y. 1; *Board of Health, etc., v. Copcut*, Id. 12; *Miller v. Horton*, 152 Mass. 540; *Hutton v. City of Camden*, 39 N. J. Law, 122.) We are, therefore, of the opinion that the act, if otherwise valid, is not open to the objection that it violates either the Federal or State Constitution in the way of depriving the defendant of its property without due process of law.

Second. We think the act is valid as an exercise of the police power with respect to the public health and also with respect to the public safety regarding fires and their extinguishment. We cannot say as a legal proposition that it tends only to the convenience of the tenants in regard to their use of water. We cannot say that it has no fair, and plain, and direct tendency towards the promotion of the public health or towards the more speedy extinguishment of fires in crowded tenement houses. That the free use of water, especially during the summer months, tends towards the healthful condition of the body by reason of the increased cleanliness occasioned by such use, there can be no reasonable doubt. The supply of water to the general public in a city has become not only a luxury, but an absolute necessity for the maintenance of the public health and safety. The city of New York itself has spent millions upon millions of dollars for the purpose of securing this great boon for the inhabitants thereof. The right of eminent domain in the taking of land around the sources of the water supply has been granted to and exercised by that city to a very large

extent, so that all sources of supply of this necessity of life should be rendered as free from contamination and danger to health and life as it possibly could be. This use of the water is not confined, so far as the necessities of the case are concerned, to the public hydrants. The water is brought into the city so that it may be used in every house and building within its limits, and, although we may, and, indeed, must admit that no health law could practically be enforced which should provide that every individual inhabitant of the tenement houses should use the water, yet we think it is perfectly clear that facilities for the use of the water will almost necessarily be followed by its actual use in larger quantities and more frequently than would be the case without such facilities, and to the great benefit of the health of the occupants of such houses. Those occupants require it more even than their more favored brethren living in airy, larger, more spacious and luxurious apartments. Their health is matter of grave public concern. The legislature cannot in practice enforce a law so as to make a man wash himself; but, when it provides facilities therefor, it has taken a long step towards the accomplishment of that object. That dirt, filth, nastiness in general, are great promoters of disease, that they breed pestilence and contagion, sickness and death, cannot be successfully denied. There is scarcely a dissent from the general belief on the part of all who have studied the disease that cholera is essentially a filth disease. The so-called ship fever or jail fever arises from filth; most diseases are aggravated by it. That opportunities, conveniences for the use of water in these tenement houses will unquestionably tend towards and be followed by more cleanly living on the part of the occupants of those houses cannot, it seems to me, admit of any rational doubt; and, if so, then the law which provides at a reasonable cost for the furnishing of such facilities is plainly and honestly a health law.

The learned counsel for the defendant asks where this kind of legislation is to stop. Would it be contended that the owners of such houses could be compelled to furnish each room with

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a bath tub and all the appliances that are to be found in a modern and well-appointed hotel? Is there to be a bath room and water closet to each room and every closet to be a model of the very latest improvement? To which I should answer, certainly not. That would be so clearly unreasonable that no court in my belief could be found which would uphold such legislation, and it seems to me equally clear that no legislature could be found that would enact it. The tenement house in New York is a subject of very great thought and anxiety to the residents of that city. The numbers of people that live in such houses, their size, their ventilation, their cleanliness, their liability to fires, the exposure of their occupants to contagious diseases, and the consequent spread of the contagion through the city and the country, the tendencies to immorality and crime where there is very close packing of human beings of the lower order in intelligence and morals, all these are subjects which must arouse the attention of the legislator and which it behooves him to see to in order that such laws are enacted as shall directly tend to the improvement of the health, safety and morals of those men and women that are to be found in such houses. Some legislation upon this subject can only be carried out at the public expense, while some may be properly enforced at the expense of the owner. We feel that we ought to inspect with very great care any law in regard to tenement houses in New York and to hesitate before declaring any such law invalid so long as it seems to tend plainly in the direction we have spoken of and to be reasonable in its provisions. If we can see that the object of this law is without doubt the promotion or the protection of the health of the inmates of these houses or the preservation of the houses themselves and consequently much other property from loss or destruction by fire, and if the act can be enforced at a reasonable cost to the owner, then in our opinion it ought to be sustained. We believe this statute fulfills these conditions. We think that in this case it is not a mere matter of convenience of the tenants as to where they shall obtain their supply of water. Simple convenience we admit would not author-

ize the passage of this kind of legislation. But where it is obvious that without the convenience of an appliance for the supply of water on the various floors of these tenement houses, there will be scarcely any but the most limited and scanty use of the water itself, which must be carried from the yards below, and when we must admit that the free use of water tends directly and immediately towards the sustaining of the health of the individual and the prevention of disease arising from filth either of the person or in the surrounding habitation, then we must conclude that it is more than a mere matter of convenience in the use of water which is involved in the decision of this case. The absence of the water tends directly towards the breeding of disease, and its presence is healthful and humanizing.

Looked at in the light of a fire law and the act is also valid. The section of the Consolidation Act in question belongs to title 7, which treats of tenement and lodging houses, and various provisions are made in the preceding sections looking towards the prevention and the prompt extinguishment of fires, as well as towards the protection and promotion of the health of the occupants of such houses. And it seems to me that the facility for the extinguishment of fires which would result from the presence of a supply of water on each floor of these houses is plain, and the act must be looked upon as a means for securing such an important result. We are inclined, therefore, to the belief that the act may be upheld under both branches alike as a health law and as one calculated to prevent destruction of property from fires which might otherwise take place.

The act is somewhat vague as to what shall be regarded as a sufficient quantity of water on each floor, but it must have in this respect as in others a reasonable construction, and when an appliance for its supply is placed on a floor where it might be open and common to all those on that floor, and easy of access, and the supply sufficient in amount for general domestic purposes, then and in such case there would be a full compliance with the provisions of the act.

Some criticism is made in regard to the wording of the order of the board of health. The order directed that suitable appliances to receive and distribute a supply of water for domestic use should be provided at these various houses, and it is claimed that there is no language in the act which requires appliances for the distribution of water, nor that the water shall be furnished for domestic use. The act provides that the water shall be furnished in sufficient quantity at one or more places on each floor occupied or intended to be occupied by one or more families. This necessarily requires some appliance for that purpose. The statute must also mean that the water is to be provided for the use of the one or more families that are to be occupants of the floor, and that must include a sufficient quantity of water for domestic purposes.

The provision in the law that the water shall be furnished in sufficient quantities at one *or more* places on each floor cannot be so construed as to leave the number of places of supply entirely to the discretion of the board of health. As the water is to be supplied in sufficient quantity for domestic and not for manufacturing purposes, when that point is reached the law is satisfied. Looking at the purpose of the supply, it is, as I have said, reasonably apparent that one such place on each floor, fairly accessible to all the occupants of the floor, would be all that could usually and reasonably be required, and anything further would be unreasonable, and, therefore, beyond the power of the board to order. The facilities thus given would at the same time furnish the means necessary for obtaining water to extinguish such fires as might accidentally break out and before they had obtained such headway as to render necessary the aid of the fire department. This is clearly a most important safeguard.

The question alluded to in the brief of the respondent's counsel, whether the penalties might not be said to have commenced running immediately after the passage of the amended act of 1887, because of the provision requiring all tenement houses to be supplied with suitable appliances before January 1, 1889, and so have amounted to a confiscation of property,

N. Y. Rep.] Dissenting opinion, per BARTLETT, J.

is not before us, as the proceeding herein was to recover only those incurred since the order was made by the board. If such a case arises where penalties so enormous in amount are claimed, there will probably be not much difficulty in refusing enforcement under the circumstances of that case.

Upon the whole we think the order of the General Term of the Court of Common Pleas should be reversed, and judgment directed to be entered upon the verdict ordered in the trial court, with costs.

BARTLETT, J. (dissenting). I am unable to discover the limit of legislative power if this act is to stand.

Upon the face of the proceeding it is not an exercise of the police power to promote the safety of property by the prevention of fire. The order of the health department served upon the defendant directs that suitable appliances "to receive and distribute a supply of water for domestic use be provided," on certain floors in the houses named.

The act provides that tenement houses "shall have Croton or other water furnished in sufficient quantities at one or more places on each floor," etc.

The order undertakes to construe the act and requires the landlord to distribute a supply of water for domestic use on each floor.

The board of health is not confined to compelling one place on each floor at which water may be obtained, but the act reads "one or more places on each floor;" so that it is left with the board of health to determine how many water faucets upon each floor shall be provided by the landlord for the use and convenience of his tenants. In other words, the legislature seeks to vest in one of the departments of the city government the power to decide the extent of the plumbing in tenement houses for Croton water purposes.

It must, of course, be admitted that water is essential to the public health, and more particularly in crowded tenement districts.

It would undoubtedly be a legitimate exercise of the police

power to compel the introduction of water into tenement houses at some convenient point where all the tenants could obtain an adequate supply, and it may be that the legislature could go so far as to require a faucet upon each floor of the large tenement houses in the public hall in order to encourage the free use of water by enabling the tenants to procure it without too great exertion, but certainly it cannot be possible that the legislature may leave the number and location of faucets on each floor for the domestic use of water to be determined by the board of health. There is no limitation as to whether the faucets shall be in the public hall or in the room of the tenant. To my mind, such an exercise of the police power is spoliation and confiscation under the forms of law; it deprives the landlord of the control of his property and leaves it to a stranger to decide in what manner the house shall be plumbed.

It is a direct interference with the right of the landlord to regulate the rental value of his property.

It is a matter of common knowledge that in rented apartments in the city of New York the convenience and volume of the water supply is regulated by the rental value of the premises, and that in the cheap tenement districts the convenience of the tenants is not and cannot be consulted to the same extent as in first-class localities.

The vice of the act we are considering lies in the fact, already pointed out, that it is too general in its terms and clothes the health department with unlimited and undefined powers.

If it be the legislative intent to compel the introduction of a more abundant supply of water into tenement houses, either to promote the public health or to provide for the timely extinguishment of fires, I think this very proper exercise of the police power should be manifested in an act containing details and limitations, so that capitalists may understand the burdens imposed upon tenement property, and decide, with a full knowledge of the facts, whether they care to embark their money in that class of buildings.

This court has held (*Matter of Jacobs*, 98 N. Y. 108) that the limit of police power "cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it."

Each case must be decided very largely on its own facts.

A sound public policy certainly dictates that at this time, when the rights of property and the liberty of the citizen are sought to be invaded by every form of subtle and dangerous legislation, the courts should see to it that those benign principles of the common law which are the shield of personal liberty and private property suffer no impairment.

I think the judgment should be affirmed, with costs.

All concur with PECKHAM, J., for reversal, except BARTLETT, J., who reads for affirmance.

Judgment reversed.

GILBERT MURDOCK et al., Respondents, v. CLARISSA WATERMAN et al., Impleaded, etc., Appellants.

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A payment on a mortgage, made after the death of the mortgagor, by his heirs who have inherited part of the mortgaged premises, to protect their title, does not arrest the running of the Statute of Limitations as against the lien of the mortgage upon another part of said premises which were conveyed by the mortgagor in his lifetime to a third person for full value, who assumed no duty as regards the mortgage, and was under no obligation to pay the mortgage debt.

A payment to arrest the running of the statute must be made by a party to or who is bound to pay the obligation, or by one who is in fact or in law his authorized agent.

It seems, that a partial payment by a mortgagor upon the debt secured, made after a conveyance of the mortgaged premises, but before the debt is barred by the statute, continues the lien of the mortgage.

Murdock v. Robinson (71 Hun, 820), reversed.

(Argued January 17, 1895; decided February 26, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made September 12, 1893, which affirmed a judgment in favor

of plaintiffs entered upon a decision of the court on trial at Special Term, after trial of certain specific facts by a jury.

The nature of the action and the facts, so far as material, are stated in the opinion.

George Brooks and *James W. Tucker* for appellants *Robinson* and *Lamb*. There is no evidence in the case that *Griswold* was the agent of either of the defendants, or that he had any authority to represent either of them, except as special guardian of *Mary Lamb*, appointed by the court to convey her interest in the north house and lot to *Mr. Palmer*. His position as guardian certainly gave him no right or authority to make any admissions that would prejudice the rights of the infant, or be binding upon her. (2 *Wharton's Ev.* § 1208; 1 *Phillips on Ev.* [5th ed.] 485.) Plaintiffs cannot maintain this action jointly. (*Addison on Cont.* [8th ed.] 938; 1 *Pars. on Cont.* 31, 32; *Goddard v. Benson*, 15 *Abb. Pr.* 191.) The Statute of Limitations is a bar to the prosecution of this action, and the payment of one dollar, as made August 8, 1885, was not such a payment as the law required to remove the bar of the statute. (*Morgan v. Rowland*, L. R. [7 Q. B.] 493; *Harper v. Farley*, 53 *N. Y.* 442; *Blair v. Lynch*, 105 *id.* 636; *McLaren v. McMartin*, 36 *id.* 92; *Smith v. Ryan*, 66 *id.* 352; *Pickett v. Leonard*, 34 *id.* 175.) The evidence shows, and the jury so found, that the one dollar paid August 8, 1885, was paid by *Lucinda Lamb*, and was paid on behalf of all the defendants. This finding was not warranted by the evidence. (*Littlefield v. Littlefield*, 91 *N. Y.* 203; *McMullen v. Rafferty*, 89 *id.* 456; *Gould v. C. C. Bank*, 86 *id.* 75.) The admission to avoid the statute must amount to an unqualified acknowledgment of the debt, disconnected with any circumstances indicating an intention not to become liable upon it. (*Deyos v. Jones*, 19 *Wend.* 493; *Arnold v. Downing*, 11 *Barb.* 554; *Crow v. Gleason*, 141 *N. Y.* 489; *Adams v. Olin*, 140 *id.* 150; *Lomer v. Meeker*, 25 *id.* 363.) The payment of one dollar did not take the case out of the Statute of Limitations as to the defendant *Mary Lamb*. (11 *Johns.* 145.)

The learned trial judge erred in finding that the mortgage in suit had not been paid. (*Giles v. Baremore*, 5 Johns. Ch. 545; *Pangburn v. Miles*, 10 Abb. [N. C.] 42; *Townshend v. Townshend*, 1 Abb. [N. C.] 81; *Dunham v. Minard*, 4 Paige, 443; *Mooers v. White*, 6 Johns. Ch. 360; *Belmont v. O'Brien*, 12 N. Y. 394.) It was claimed by the respondents, on the argument of the cause at General Term, that as no formal motion for a new trial had been made before the trial judge, the verdict of the jury was conclusive upon the appeal as to the facts found by such verdict. It is submitted that the case at bar does not come within the rule. (*Bowen v. Becht*, 35 Hun, 434; *Littlefield v. Littlefield*, 91 N. Y. 205; *Shoemaker v. Benedict*, 1 Kern. 178; *F. N. Bank v. Ballou*, 49 N. Y. 155; *Harper v. Fairley*, 53 id. 442; *Winchell v. Hicks*, 18 id. 558; *In re Kendrick*, 107 id. 109.) It was held by the trial court that, as no personal representatives of the mortgagors were ever appointed, the Statute of Limitations has been suspended since their death under the provisions of section 403 of the Code of Civil Procedure, and hence the defendants cannot avail themselves of the bar of the statute as a defense to this action. It is submitted that this is not a correct interpretation of the section of the Code cited. (*Church v. Olendorf*, 49 Hun, 439; *In re Quinlan*, 2 Dem. 29; *Chapman v. Fonda*, 24 Hun, 130; *Sanford v. Sanford*, 62 N. Y. 553.)

E. M. Harris for appellant Waterman. The court erred in refusing to dismiss the complaint as to defendant Waterman, and in refusing the several requests of the defendant. The bond and mortgage are presumed to have been paid by reason of lapse of time. (Code Civ. Pro. § 381; *Burnham v. Brown*, 23 Maine, 400; *Frank v. Morrison*, 55 Md. 399; *Heywood v. Perrin*, 10 Pick. 228; *Parker v. Banks*, 79 N. C. 480; *Bush v. Stowell*, 71 Penn. St. 208.) But independent of the indorsements mentioned, or the one dollar payment, and the verdict of the jury, it is submitted that the action as to the defendant Waterman cannot be maintained.

The mortgage as to her property is barred by the Statute of Limitations. (*Hansett v. Patterson*, 124 N. Y. 349; *Harper v. Fairley*, 53 id. 442; *Kelly v. Weber*, 27 Hun, 8; *Smith v. Ryan*, 66 N. Y. 352, 356, 357; *Littlefield v. Littlefield*, 91 id. 203; *Miller v. Magee*, 17 N. Y. S. R. 547; *Blair v. Lynch*, 105 N. Y. 636; *Lord v. Morris*, 18 Cal. 482.)

Lynn J. Arnold for respondents. Defendants' objection on the trial that there was a misjoinder of parties plaintiff was not well taken, and in any event came too late. (*In re Albrecht*, 136 N. Y. 91; 1 Pom. Eq. Juris. § 114.) As defendants did not move for a new trial of the issues submitted to the jury, they are precluded from questioning the verdict or reviewing the exceptions taken upon the jury trial. (*Chapin v. Thompson*, 23 Hun, 12, 15; 80 N. Y. 275, 277; 89 id. 271, 274.) The exceptions filed by defendants to findings of fact, and exceptions filed by defendant Waterman, to computation of interest by referee, were not well taken. (Code Civ. Pro. §§ 992, 993; *Cram v. Bradford*, 4 Abb. Pr. 193; *Hill v. Reynolds*, 30 Barb. 488; *Porter v. Smith*, 35 Hun, 118; *O'Brien v. Young*, 95 N. Y. 428.) The one dollar payment by the Lamb heirs kept the mortgage debt alive and a lien on that portion of the mortgaged premises owned by them. (*Dings v. Guthrie*, 45 Hun, 436, 438; *Pears v. Laing*, L. R. [12 Eq.] 51, 54.) The one dollar payment by the Lamb heirs kept the mortgage debt alive, so that it continued a lien on the portion of the mortgaged premises owned by Clarissa Waterman. (*N. Y. L. Ins. Co. v. Covert*, 6 Abb. Pr. [N. S.] 154; *Hansett v. Patterson*, 124 N. Y. 449; *Pears v. Laing*, L. R. [12 Eq.] 41; *Hughes v. Edwards*, 9 Wheat. 489-492; *Littlefield v. Littlefield*, 91 N. Y. 203-209; *Tighe v. Morrison*, 116 id. 263; *Rodman v. Morley*, 1 DeG. & J. 1; 2 Jones on Mort. [4th ed.] § 1202; Code Civ. Pro. §§ 380, 381, 403.)

ANDREWS, Ch. J. The only question arises upon the defense of the Statute of Limitations. The action is for the

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foreclosure of a mortgage executed by Alanson Lamb and Daniel Lamb to Harvey Murdock and Erastus Robinson, dated Sept. 21, 1861, to secure the payment of \$826, with interest, in installments, the last of which became due Sept. 21, 1865. The mortgage contains an express covenant of payment in the same terms as in the bond of the mortgagors executed concurrently therewith, and purports to bind them, "their heirs, executors and administrators." The mortgaged premises consisted of a village lot, on which were two dwelling houses owned by the mortgagors as tenants in common. Alanson Lamb died intestate in 1870, and his undivided half of the mortgaged premises descended to his daughter, the defendant Mary Lamb. In 1871, Daniel Lamb and Mary Lamb by her special guardian conveyed the south half of the lot and the dwelling house thereon to one Palmer, under whom the defendant Clarissa Waterman claims, for the sum of \$1,650; the full value of the granted premises. The conveyance was by separate deeds. The deed executed by Daniel Lamb was with warranty, and the deed by the special guardian of Mary Lamb contained no covenants of title. Neither deed referred to the mortgage. The surviving mortgagor, Daniel Lamb, died intestate in 1872, and his undivided one-half interest in the north half of the mortgaged premises descended to his daughters, Harriet Robinson and Lucinda Lamb, and his granddaughter, Mary Lamb. Lucinda Lamb died intestate November 8, 1887, and her interest derived from Daniel Lamb descended to her sister, Harriet Robinson, and her niece, Mary Lamb. When this action was commenced the title to the mortgaged premises was held as follows: The south one-half was owned by Clarissa Waterman under the deeds executed in 1871; the north half had descended to and was owned by the defendants Harriet Robinson and Lucinda Lamb, one-fourth part by the former and three-fourths parts by the latter.

No part of the principal sum secured by the mortgage has been paid. The mortgagors in their lifetime paid the interest up to September 21, 1865 (the day when the whole principal

sum became due), and the payments were indorsed on the mortgage. No subsequent payment was made at any time until August 8, 1885, when, as is found by the trial judge, the sum of one dollar was paid and applied on the bond and mortgage "by Lucinda Lamb, on behalf of Lucinda Lamb, Harriet Robinson and Mary Lamb, in their presence and with their knowledge and approval, and in recognition of the mortgage lien." This is the payment relied upon to take the case out of the statute. It was made nearly twenty years after the mortgage became due, and the same period after the last preceding payment had been made. It was held by the trial court that this payment kept the mortgage in life not only as against the part of the mortgaged premises then owned by the parties by whom the payment was made, but also as against the part of the premises owned by Clarissa Waterman, who was not a party to that transaction and who neither authorized, consented to or ratified such payment. The payment was made on an occasion when the mortgagees called at the house on the mortgaged premises, occupied by Harriet Robinson, Lucinda and Mary Lamb, and informed them that the mortgage was about to outlaw, and required that a payment be made in order to prevent a foreclosure.

It appears from the evidence that Palmer went into possession of the south house and premises under the deed of 1871, and that he and his grantees have remained in visible occupation since that time, and there is no ground for doubt that the mortgagees on the 8th day of August, 1886, when the payment of one dollar was made, fully understood the facts respecting that conveyance and the possession thereunder, and the history of the devolution of the title of the other half of the mortgaged premises by reason of the death of Alanson Lamb. No administrators of the estate of either Daniel or Alanson Lamb have been appointed.

We entertain no doubt that the finding that the payment of one dollar made August 8, 1885, was made in behalf of and with the knowledge and approval of all the three owners of this north half of the mortgaged premises, and in recognition

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of this mortgage lien, is supported by evidence. Nor is there any doubt that the payment operated to continue the lien of the mortgage for twenty years thereafter (unless sooner paid) as against the part of the premises then owned by the descendants of Alanson and Daniel Lamb. It was an unequivocal acknowledgment by them of the mortgage. The serious question arises as to the effect of this payment upon the lien of the mortgage upon the part of the premises owned by Mrs. Waterman, who confessedly was not a party to the payment. The question is whether a payment on a mortgage made by the heirs of the mortgagor, who have inherited part of the mortgaged premises, made after the death of the ancestor, to protect their title, arrests the running of the statute as against the lien of the mortgage, on a part of lands embraced therein, conveyed by the mortgagor in his lifetime to a third person for full value, who assumed no duty and who was under no obligation to pay the mortgage debt.

The statute (Code Civ. Pro. §§ 380, 381) fixes the period of twenty years after the cause of action has accrued for the commencement of an action upon a sealed instrument, and this applies to an action for the foreclosure of a mortgage. (*Acker v. Acker*, 81 N. Y. 143.) The rule was the same under the former Code. (Sec. 90.) Under the Revised Statutes the lapse of twenty years from the accruing of a right of action on a sealed instrument for the payment of money, created a presumption of payment, which might be repelled by proof of payment of some part, or by a written acknowledgment of such right within that time. (2 Rev. St. 301, § 48.) Prior to the Revised Statutes an action for the foreclosure of a mortgage was not within any Statute of Limitations in this state, but courts of equity, in analogy to limitation at law, held that, in the absence of explanation, the remedy by foreclosure was barred where there had been a delay of twenty years between the accruing of the right of action and the filing of the bill, on the presumption that the mortgage had been paid. (*Giles v. Baremore*, 5 Jo. Ch. 545.) The Statute 21 Jac. 1, c. 16, upon which most of the Statutes of Limitation in the

several states prescribing the period of limitation of actions at law have been modeled, contained no provision on the subject of the effect of acknowledgments or payments in renewing or continuing the debt, but the courts of England, by a species of judicial legislation grafted on to the statute exceptions founded on these circumstances, and they have been embodied in the subsequent English statutes. Lord Tenterden's Act (9 Geo. IV, ch. 14, § 1) required that where an acknowledgment was relied upon to take a case out of the statute, the acknowledgment should be in writing, signed by the person to be charged thereby, but it did not deal with the effect of a part payment, nor define by whom it might be made nor who should be bound thereby. It left the subject to be regulated by the courts. (See CHITTY, J., *In re Hollingshead*, L. R., 37 Ch. Div. 651.) The statutes of this state have in the same way left the subject of what constitutes a part payment and its effect to judicial exposition. The provision of the present Code, which is substantially a re-enactment of section 110 of the former Code, is the only statutory rule in this state on the subject. It declares that "An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take a case out of the operation of this title. But this section does not alter the effect of a payment of principal or interest." The section primarily relates to actions on contracts for the payment of money. But it leaves the effect of a part payment undefined. It does not declare that the payment must be made by the debtor, or by a person obligated to pay the debt, or, if made by one of several joint debtors, whether such payment shall operate against all. The effect of a part payment in any case, and against whom it shall operate, is to be determined by the principles established by the decisions of the courts applicable to the subject. The question has most frequently arisen in actions of assumpsit brought upon promises for the payment of money, against the party to the contract, in which the Statute of Limitations has been interposed as a defense, and the general principle has

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been asserted with great uniformity that a part payment, available to take the case out of the statute, must have been made by the debtor or his authorized agent, or if made originally without his authority, it must have been subsequently adopted by him as his act. This view is founded upon the reason upon which a part payment is held to renew or continue a debt. Part payment of a debt by a debtor constitutes an admission by the person obligated to pay, of his liability for the whole debt upon which the partial payment is made, and justifies an inference of a new promise made at that time to pay the portion remaining unpaid. The courts acting upon this admission, and inferring therefrom the new promise, treat the contract as renewed from the time of the part payment, and the payment as giving a fresh start to the running of the statute. It is obvious that a payment by a stranger, or by a person not authorized to represent the debtor, affords no ground for assuming any admission on his part, or for inferring a new promise by him to pay the balance of the debt, and a payment not made by him or by his authority cannot, therefore, arrest the running of the statute. But in the application of the doctrine that a part payment within the statute must be made by the debtor or by his authority, there has been much diversity of judicial opinion. The effort has been frequently made to have it adjudged that whenever the person making the payment is under a liability to answer for the debt upon which the payment is made, a part payment by him will inure as a payment by all the parties bound by the same obligation, and will be treated in applying the statute as if made by all. The decision of Lord MANSFIELD in the leading case of *Whitcomb v. Whiting* (Doug. 652), that a payment made by one of four joint and several makers of a promissory note, took the case out of the statute as to all, was placed on the ground that there was a *quasi* agency created by the contract whereby the act of one was binding upon the others. The doctrine of *Whitcomb v. Whiting* was followed in some of the earlier cases in this state, but was finally repudiated in the case of *Van Keuren v. Parmelee* (2 N. Y. 523), and it has

come to be the established doctrine here that a part payment of a debt by one of two or more joint contractors does not take the case out of the statute as to the others, and this whether such payment is made before or after the debt has been barred. (*Shoemaker v. Benedict*, 11 N. Y. 177.) The existence of a common liability of several for a debt does not of itself make each the agent of the others, to bind them by part payment. The court has in a great variety of cases enforced with great strictness the rule that a part payment must be made by the debtor or by his authority in order to take the case out of the statute. This has been held in respect to a payment by a surety, unless at the request of the principal (*Winchell v. Hicks*, 18 N. Y. 558); by the assignee of an insolvent debtor (*Pickett v. Leonard*, 34 N. Y. 175); by the application by the creditor of money derived from collateral securities assigned to him by the debtor (*Harper v. Fairley*, 53 N. Y. 442); by the maker of a note, of interest, as against the indorser. (*McMullen v. Rafferty*, 89 N. Y. 456.)

In determining the question whether the payment by the heirs of Alanson and Daniel Lamb of the sum of one dollar on the mortgage, continued the lien as against Mrs. Waterman, it is important to consider her and their relation to the debt and the property embraced in the mortgage. Neither Mrs. Waterman nor her grantors had assumed or were under any personal liability for the mortgage debt. The mortgage remained a lien on the land conveyed to Palmer in 1871, but in equity the north half of the lot was chargeable with the mortgage debt and was first liable to be sold on foreclosure. The fact that Palmer paid full value for the south half of the lot did not alter the rights of the mortgagees. Their mortgage remained a lien as well on the part of the lot sold to Palmer, as upon the part remaining unsold. But Palmer and his grantees, so far as appears, had never been called upon for payment. The Lamb heirs stood in a double relation to the mortgage debt. Their half of the lot was subject to the mortgage and primarily chargeable. They also as heirs of one or

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the other of the mortgagors, having acquired title to the mortgaged premises by descent, were liable under the statute (1 Rev. St. 749, § 4) to satisfy or discharge the mortgage out of their own property. The statute was recently construed in *Hauselt v. Patterson* (124 N. Y. 349), and it was held in substance that the liability of heirs or devisees was limited to the property descended or devised, or its value in case of alienation. Assuming that the right to a remedy under this statute was not barred by the lapse of time, the Lamb heirs, who made the payment of August 8, 1885, may have been under a liability which could have been enforced against their property other than that embraced in the mortgage, depending upon whether they took any other than the mortgaged premises by descent. But in no other way were they liable for the mortgage debt. The mortgagees demanded and accepted from the Lamb heirs the nominal payment made August 8, 1885, with full knowledge of the conveyance to Palmer in 1871, as a condition of forbearing a foreclosure of the mortgage, and it was paid by them for the sole purpose of protecting their title. It undoubtedly preserved the lien of the mortgage upon the part of the land owned by them. But to give it the further efficacy of continuing the lien on the part of the property in which they had no interest, implies that they were the agents of Mrs. Waterman to renew the mortgage as to her, a relation which has no support in the evidence. It could not we apprehend be successfully contended that the payment by the Lamb heirs would have renewed the debt as against the administrators of the mortgagors, and much less we think can it be claimed that it continued the lien of the mortgage as against Mrs. Waterman. It was held by the chancellor in *Mooers v. White* (6 Jo. Ch. 373) that an acknowledgment by an executor or administrator would not bind the real assets in the hands of the heir or devisee so as to affect the right of either under the Statute of Limitations. The question is not the same as it would have been if, during the running of the statute, but after their conveyance, the mortgagors had made a partial

payment on the debt. It has been held that a partial payment by a mortgagor on the debt, even after he had conveyed the premises mortgaged, would continue the lien of the mortgage. (*N. Y. Life Ins. & Trust Co. v. Covert*, 6 Abb. Pr. [N. S.] 154, Ct. Appeals; *Hughes v. Edwards*, 9 Wheat. 489.) The mortgage is an incident to the debt, and when payments are made by the debtor, the mortgagee is not called upon to inquire how the mortgagor has dealt with the equity of redemption. If the mortgage is recorded the purchaser has constructive notice of its existence, and a dealing with the debt between the debtor and creditor in the usual course is to be expected. The mortgagors until at least the debt is barred represent all persons interested in the land. If not recorded and the grantee purchased in good faith for value, without notice, then the lien of the mortgage is destroyed. But upon the death of a mortgagor personally bound to pay the debt, a new situation arises. His personal representatives become liable to the extent of the personal assets. If the mortgaged premises descend to his heirs or are devised, they are the primary resource in exoneration of the personalty, unless (in case of a will) the testator otherwise directs. (1 Rev. St. 749, § 4.) If during his life the mortgagor had conveyed the equity of redemption, his grantee does not become personally liable for the debt unless he assumed its payment, but the land remains subject to the pledge whatever may be the form of the conveyance. But upon the death of the mortgagor, after having conveyed the land, the personal liability is separated from the ownership of the land. Where the equity of redemption has been conveyed in parcels, without any personal covenant by the grantees to pay the debt, the land alone as between them and the mortgagees is liable. The judgment below proceeds upon the doctrine that the owner of one parcel acting separately, and independently of the owner of the other parcels, may by payment continue the lien of the mortgage beyond twenty years, not on his own parcel alone, but on all the parcels. He could not do this by a written acknowledgment, as such an acknowledgment must

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under the statute be made by "a person to be charged thereby," and a payment by the owner of one parcel ought not, we think, to be given any greater effect. It would be an admission of the debt, but an admission *sub modo* affecting only the party making it. The payment would create no personal liability, even against him. He could not bind the owners of the other parcels by his admission, because he would neither in law nor in fact represent them. Payment by an heir or devisee, as such, is, we think, subject to the same limitation. It would continue his liability under the statute to the extent of the real assets in his hands, but would have no effect against the owners of the equity of redemption in arresting the running of the statute. A partial payment continues the debt on the theory that it implies a new promise, but the new promise can be implied only against the person making the payment, or when made in his behalf by one who, in law or in fact, is authorized to bind him.

We have found no authorities directly upon the question presented in this case. The case of *Roddam v. Morley* (1 DeG. & J. 1) involved the question whether a payment by a devisee for life, of interest on a specialty of his testator, in which the heirs were bound, was an acknowledgment "by the party liable by virtue of such specialty," within the meaning of the 5th section of the Act 3 and 4 Will. IV., c. 42, and as such was sufficient to keep the right of action alive against the parties interested in remainder, and it was held that it was. The principle of this decision is very clearly set forth by CHITTY, J., in the case *In re Hollingshead* (L. R., 37 Ch. Div. 651-659), which involved a similar question as to the liability of devisees on a simple contract of the testator. Speaking of *Roddam v. Morley*, he says: "The right principle to adopt is, that so far as the real estate is concerned, there is no one else but the tenant for life to pay the interest; that in making such payment he represents the whole estate; that the payment is an admission of the liability to the debt, affecting the real estate of which he is in possession; it is sufficient evidence of the continuance of the testator's con-

tract to pay the debt, or (if it be necessary to have recourse to the somewhat subtle doctrine of a promise to pay) it is a promise to pay out of such real estate, which he, as the person in possession of such real estate is competent to give on behalf of the real assets generally and so as to bind them who take in remainder." These two cases proceed distinctly on the ground of implied agency. In *Coope v. Cresswell* (L. R., 2 Ch. App. 112) Lord CHELMSFORD questioned the decision in *Roddam v. Morley*, although not governing the case then before him. In *Coope v. Cresswell* the bill was filed in behalf of certain specialty creditors of a decedent to have the debt raised out of certain devised estates. The testator devised certain real estate to trustees in trust for E. for life, and other real estate to the same trustees for the payment of debts. All the real estate was, under the English statute, assets for the payment of debts. The owner of the equitable life estate pleaded the Statute of Limitations, and the court sustained the defense, holding that payment within twenty years of interest on the debt by the trustees, was not sufficient to take the case out of the statute as to the equitable life tenant. In *Dickenson v. Teasdale* (1 De G., J. & S. 52) it was held by Lord Chancellor WESTBURY that where there were separate devises of lands to two nephews of the testator, all of which were charged with the payment of his debts, that payments made on the bond in question by one of the devisees after the death of the testator, was not an answer to the plea of the statute by the other. *Pears v. Laing* (L. R., 12 Eq. 41) was a decision by Sir JAMES BACON, V. C., upon very complicated facts, involving the Statute of Limitations. Certain payments of interest had been made by Ann Heron, a devisee and legatee, after the death of the testator, on a mortgage executed by him in his lifetime, and the question was whether the mortgage was barred by the statute. The defense was overruled on two grounds, the payments made by Ann Heron, and, second, payments made by the trustee who held the title to the entire estate, which latter ground was regarded by the judge as controlling and decisive. Upon the facts assumed by the court in passing upon the

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effect of the payments by Ann Heron, the decision seems to have little bearing upon the present discussion. In *Harlock v. Ashberry* (L. R., 19 Ch. Div. 539) it was held by Sir GEO. JESSEL, M. R., that payment by a tenant of part of a mortgaged estate, of rent due, made to the mortgagee on his demand, but without authority of the mortgagor, was not a payment within 3 and 4 Will. IV, c. 27, § 40, or 1 Vict. ch. 28, which will take a case out of the statute. (See, also, *Chinnery v. Evans*, 11 H. L. Cas. 115.)

The question presented in the case before us is important. It should be determined, in the absence of express authority, in the light of the principles upon which partial payments are held to be an answer to the statute. The guiding and controlling consideration is that the payment must be made by a party to the obligation, or by his authorized agent. If payment by one is relied upon to take the contract out of the statute as to another, it must be shown that the party who made the payment was in fact or in law the agent of the other in respect to his liability. When the person paying is bound, those in privity with him may be bound also. There is lacking in respect to the payment relied upon in this case to bind Mrs. Waterman, (1) any agency on the part of the Lamb heirs to act for her or to bind her interest in the land; (2) any power growing out of or incident to their relations to the land or to the debt, from which the law will imply an authority, and (3) the admission, inferable from the payment, construed in the light of the circumstances, was an admission simply that the mortgage was a subsisting lien on the part of the land then owned by them.

Our conclusion is that the judgment of the General and Special Terms should be reversed, with costs in all courts as to Mrs. Waterman, and that the judgment of the General Term be affirmed, with costs as against the other appellants.

All concur.

Judgment accordingly.

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151 840**HENRY HARBECK, Appellant, v. SARAH KATHARINE PUPIN et al., as Executors, etc., Respondents.**

In an action against the executors of A. to recover a balance unpaid upon a note executed by the firm of W. & Co., of which firm plaintiff claimed that A. was a dormant partner, the complaint alleged that a judgment by confession was entered against the co-partners other than A.; that, pursuant to a compromise agreement, plaintiff executed a release to the members of the firm who confessed the judgment, other than W. The release recited that said firm was indebted to plaintiff "by virtue of a judgment;" that he had agreed with the members of the firm, other than W., to compromise his "claim on them individually in respect of the said indebtedness." The release then, by its terms, released and discharged the members of the late firm other than W. from all individual liability in respect of the said indebtedness, and further stated that it should operate to release and discharge "all and every person or persons other than" W. of and from all liability "growing out of the indebtedness aforesaid." *Held*, that the release not only covered and operated upon the judgment, but also the note, and released all persons other than W.; and so that, assuming A. to have been a dormant partner, his liability was covered and he was discharged.

At the time of the confession of judgment the attorney for the members of the firm who joined in the confession gave the names of the members without mentioning that of A., whom he had no authority to represent; at the time of the execution of the release, which was drawn by said attorney, he was authorized to act for A. *Held*, that defendants were not estopped from claiming that the intended and legal effect should be given to the release; that all that could be claimed was a representation that A. was not a member of the firm, and an estoppel would simply prevent a denial of that assertion.

Also *held*, that plaintiff, while retaining what he had received under the compromise agreement, could not seek to so reform it as to annul it as a contract operative between him and A.

Also *held*, that the principle that where one deals with a known member of a firm so as to discharge him, the release does not operate to set free an unknown and dormant partner, did not apply where, as here, there is an express covenant to release the dormant partner.

(Argued January 22, 1895; decided February 26, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon

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an order made April 13, 1894, which affirmed a judgment in favor of defendants entered upon an order dismissing the complaint on trial at Circuit.

This action was brought against the executors of the will of Frederick K. Agate, deceased, to recover a balance unpaid upon a promissory note made by the firm of W. H. Whitaker & Co. The complaint alleged that William H. Whitaker, Sanford W. Battershall, John E. D. Grainger and Frederick K. Agate were the members of said firm; that on or about September 21, 1885, judgment by confession was entered upon said note against the members of said firm except Agate, and an execution issued thereon was returned unsatisfied; that on March 18, 1886, said firm having been dissolved Battershall and Grainger made a separate composition with plaintiff and he executed to them a release under seal whereby he released the said Battershall and the said Grainger, and their estates and the estates of each of them, of and from all individual liability, claim and demand whatever, for, or in respect of, the said indebtedness existing by virtue of said judgment, that being the only indebtedness or liability incurred by the said Grainger and Battershall to the plaintiff by reason of their connection with the said partnership, and in and by which release it was expressly stated and provided that the said release was made pursuant to section 1942 of the Code of Civil Procedure, and should have no greater or other effect than as by said act and by said release was provided. But said release contained no clause stating in terms that the said Harbeck released the said Grainger and Battershall from all liability incurred by reason of their connection with the partnership.

Defendants' answer admitted that Battershall and Grainger made a separate composition with plaintiff, and executed a release, but denied that its contents were accurately stated in the complaint and alleged that plaintiff thereby released all the members of said firm except Whitaker and thereby released defendants' testator. It was claimed by plaintiff that Agate was a dormant partner in the firm at the time of the

execution of the note and that at the time of the execution of the release plaintiff was ignorant of this fact.

The following is the release referred to :

"WHEREAS, the late co-partnership firm of W. H. Whitaker & Co., of the city, county and state of New York, are indebted to me, the undersigned, Henry Harbeck, of the city, county and state of New York, in the sum of thirty thousand seven hundred and fifty-four and thirty-three one-hundredths dollars (\$30,754.33), with interest from the twenty-first day of September, 1885, by virtue of a judgment recovered in the Supreme Court of the state of New York, held in and for the city and county of New York, in an action wherein said Henry Harbeck was the plaintiff and the said late firm were defendants ;

"And WHEREAS, such firm has been dissolved ;

"And WHEREAS, I have agreed with the members of the said late firm of W. H. Whitaker & Co., other than said W. H. Whitaker, to compound or compromise my claim on them individually, in respect of the said indebtedness to me of the said late firm ;

"Now, therefore, this agreement witnesseth, that in consideration of the sum of one dollar and other good and valuable considerations to me, the said Henry Harbeck, paid by the said members of the said late firm of W. H. Whitaker & Co., other than the said W. H. Whitaker, at or before the time of subscribing this release, I, the said Henry Harbeck, do hereby, according to the statute in such case made, release, acquit and forever discharge the said members of the late firm of W. H. Whitaker & Co., other than said W. H. Whitaker, and their estate or estates, and that of each of them, of and from all individual liability, claim and demand whatsoever, for or in respect to the said indebtedness to me of the said late firm. Provided, however, that this present release is made pursuant to section 1942 of the Code of Civil Procedure, and shall have no greater or other effect than as by the said act and by this release is provided ; and shall not release or discharge said W. H. Whitaker or his estate, but shall operate to release and dis-

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charge all and every person or persons other than the said W. H. Whitaker of and from any and all liability and obligation growing out of the indebtedness aforesaid. Nothing herein contained shall affect or impair a certain agreement dated August 20, 1885, by which certain claims and demands due the firm of W. H. Whitaker & Co. were to be held in trust for the said Harbeck; all the terms and provisions of the said agreement to remain in force notwithstanding this agreement."

Further facts are stated in the opinion.

J. Tredwell Richards for appellant. Agate was never liable upon the debt released, and the release was fruitless so far as he was concerned. (*In re Washington Park*, 52 N. Y. 131.) The note is not merged in the judgment, nor is the obligation of Agate on the note merged in the judgment. After the judgment the liability of Agate on the note survived absolutely unaffected by the judgment. (*Candee v. Smith*, 93 N. Y. 351; *Harbeck v. Pupin*, 123 id. 115.) The note upon which this action is brought, and the judgment against Whitaker, Battershall & Grainger, are, to a certain extent, concurrent obligations, but because the obligations are concurrent it does not follow that they are identical, nor that a release from one will discharge the other. (*M. S. Bank v. Pierce*, 137 N. Y. 444; *Walsh v. Trevarion*, L. R. [12 Q. B.] 734; *Simons v. Johnson*, 3 Barn. & Ald. 175; 2 Roll. Abr. 409; *Paylor v. Homersham*, 2 M. & S. 423; *Moore v. Magrath*, 1 Cowp. 9; *Browning v. Wright*, 2 B. & P. 13; *Lyman v. Clark*, 9 Mass. 234; *Rich v. Lord*, 35 id. 322; *Jackson v. Stackhouse*, 1 Cow. 122; *Van Hagen v. Van Rensselaer*, 18 Johns. 420.) The release is in conformity with section 1942 of the Code. (*Harbeck v. Pupin*, 123 N. Y. 115; *Luddington v. Bell*, 77 id. 138.) Treating the release as one to Battershall and Grainger only, even if it had not been made pursuant to section 1942, the release of these two joint debtors would not have the legal effect of discharging Agate, because, taking the release as a whole, it appears affirmatively, upon the face of the instrument, that it was not

intended to discharge Agate or any of the partners except Battershall and Grainger. (*Thompson v. Lock*, L. R. [3 C. B.] 540; *North v. Wakefield*, 13 Ad. & El. 535; *N. Ins. Co. v. Potter*, 63 Cal. 157; *Seymour v. Butler*, 8 Iowa, 304; *Burke v. Noble*, 48 Penn. St. 168; *Couch v. Mills*, 21 Wend. 434; *Hood v. Hayward*, 48 Hun, 330.) Even if the release to Battershall and Grainger had in terms released them from the note and not from the judgment, and had been in such form as would ordinarily have had the effect to discharge Agate also, yet, because Agate was a dormant partner, and the plaintiff, after due diligence and inquiry, had been unable to ascertain that he was a partner, the release can have no legal consequences as to Agate, and is ineffectual to discharge him. (*Robinson v. Wilkinson*, 3 Price Exch. 538.) Apart from the doctrine of estoppel, the release, if necessary, may be reformed or its construction limited, so as to exclude Agate, upon equitable grounds; namely, for mutual mistake, or for fraud on one side and mistake on the other. (*Kirchner v. N. H. S. M. Co.*, 135 N. Y. 182.) Even if this is not a proper case for reformation of the release, or for a construction which will give it effect according to equity and good conscience, and if the release be considered efficient to discharge Agate, unless rescinded as to him, yet the plaintiff may, nevertheless, treat it as rescinded as to him, and sue upon the original debt, as in this case plaintiff has done. (*Garry v. Hull*, 11 Johns. 441; *Tyson v. Doe*, 15 Vt. 571; *Clark v. Mayor, etc.*, 4 N. Y. 338; *Merrill v. I. & O. R. R. Co.*, 16 Wend. 586; *Gould v. C. N. Bank*, 86 N. Y. 75; *Pierce v. Wood*, 23 N. H. 519; *Cobb v. Hatfield*, 46 N. Y. 533.)

George C. Holt for respondents. The release executed by Harbeck, dated March 18, 1886, is a bar to the action. (*Kirchner v. N. H., etc., Co.*, 135 N. Y. 188; *Dambmann v. Schulting*, 75 id. 60; *Graham v. Meyer*, 99 id. 611; *Nevius v. Dunlap*, 133 N. Y. 676; *Kent v. Manchester*, 29 Barb. 595; *Stoddard v. Hart*, 23 N. Y. 556; *Brice v. Lorillard*

Ins. Co., 55 id. 240; *Wilson v. Dean*, 74 id. 531; *Garham v. Bird*, 57 Barb. 277; *Albany, etc., v. Burdick*, 87 N. Y. 47; *Thompsonville, etc., Co. v. Osgood*, 26 Conn. 16.) The plaintiff cannot repudiate the release without returning the consideration paid for it. (*Gould v. C. Bank*, 86 N. Y. 75; *Cobb v. Hatfield*, 46 id. 533; *McMichaels v. Kilmer*, 76 id. 46; *Shiffer v. Deitz*, 83 id. 300; *Graham v. Meyer*, 99 id. 611; *Allison v. Abendroth*, 108 id. 475; *Allerton v. Allerton*, 50 N. Y. 670; *Vail v. Reynolds*, 118 id. 297.) If the release of March 18, 1886, notwithstanding its terms, should be construed to be a release to Battershall and Grainger only, as claimed by the plaintiff's counsel, it nevertheless had the effect of releasing Agate, even if he was a partner, because it was not executed in compliance with the statute, permitting the release of some joint debtors without releasing others. (Code Civ. Pro. § 1942; *Harbeck v. Pupin*, 123 N. Y. 119.) There was not sufficient competent evidence that Agate ever became a member of the firm of Whitaker & Co. to be submitted to the jury. (*Richardson v. Hughitt*, 76 N. Y. 58; *Eager v. Crawford*, 76 id. 97; *Barnett v. Snyder*, Id. 344; *Curry v. Fowler*, 87 id. 33; *Clift v. Barrow*, 108 id. 187; Code Civ. Pro. § 829; *Connelly v. O'Connor*, 117 N. Y. 91; *Nelson v. S. M. Ins. Co.*, 71 id. 460; *Ten Eyck v. Bill*, 5 Wend. 55; *Doty v. Wilson*, 14 Johns. 378; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 585.) There was absolutely no evidence in the case that Grainger ever knew of or consented to Agate's alleged introduction into the firm of Whitaker & Co. (*Burnett v. Snyder*, 76 N. Y. 347.) Assuming that Agate was a member of the firm, and continued to be such until its suspension, this action cannot be maintained, because the note was given without his knowledge or assent after the dissolution of the firm. (*Spaulding v. Kelly*, 43 Hun, 306.) The plaintiff failed to establish a cause of action because the judgment against Whitaker, Battershall and Grainger was satisfied by the two releases given by Harbeck. (*Robertson v. Smith*, 18 Johns. 459; *Oakley v. Aspinwall*, 4 N. Y. 542; *Olmstead v. Webster*, 8 id. 413; *Suydam v. Barber*, 18 id.

468; *Candee v. Smith*, 93 id. 349; *Kendal v. Hamilton*, L. R. [3 C. P. Div.] 403; L. R. [4 App. Cas.] 504; Code Civ. Pro. §§ 1492, 1493.) There are no equitable grounds of liability in this case. (*Armstrong v. Stokes*, L. R. [7 Q. B.] 604.)

FINCH, J. The fundamental question in this case is the true construction of the release upon which the defendant relies.

We regard that release, executed by Harbeck, as broad enough to discharge Agate, assuming that the latter was a dormant partner in the debtor firm. The criticism of the appellant is very narrow and technical, and founded upon one expression in the instrument, with an entire disregard of its manifest scope and meaning. That criticism is that the release, by its terms, only discharges the judgment and operates upon that, and does not discharge the debt for which the judgment was confessed; and such construction is founded upon the statement in the release that the firm is indebted to Harbeck in the sum named "by virtue of a judgment," whereby, it is claimed, the discharge granted from the said indebtedness means solely and alone that evidenced by the judgment, and, therefore, necessarily includes only the judgment debtors and excludes Agate. But the instrument, by its explicit terms, negatives that construction. It does not run to Battershall and Grainger by name and purport to release them alone, or confine its terms or its operation to the defendants in the judgment. It acknowledges an agreement of composition, not with Battershall and Grainger merely, but with "the members of the firm of Whitaker & Co. other than Whitaker;" language not confined to two of the judgment debtors, but explicitly embracing all the members of the firm with the one exception. And that agreement is declared to be, not to simply discharge a judgment against two, but, as it reads, "to compromise my claim on them individually in respect to the said indebtedness to me of the said late firm." That must necessarily be construed to mean the entire debt of the firm,

however that firm was composed or whoever might constitute its members. It then proceeds to release the members of the late firm other than Whitaker from liability for or in respect of the said indebtedness of the said late firm, and very conclusively fixes the intent and meaning of the parties by the further statement that it shall operate to release and discharge "all and every person or persons other than the said W. H. Whitaker of and from any and all liability and obligation growing out of the indebtedness aforesaid." That was not, as is contended, a mere general clause to be restricted by a narrower and special statement preceding, for there was none of that character, but it was a further explanation of a purpose already stated, entirely consistent with it, and meant to put the meaning of the parties beyond any reasonable doubt. "Any and all liability and obligation growing out of the indebtedness aforesaid," covered the original account, the note which expressed it, and the judgment which secured it, and from that liability, whatever its form, all persons, and every person other than Whitaker, were to be released. The creditor must have been very blind not to understand that, as the condition of receiving three thousand dollars in cash and certain specified notes, he was required to discharge, not merely two judgment debtors, but his claim against every member of the firm other than Whitaker. That he did not know that there was any other does not matter. It is not even yet certain that there was, but if there was or should be such an unknown person the release plainly covered his liability; was intended to cover it by those who paid for it, and must have been understood to cover it by the creditor who executed it. The trouble is not that he did not understand its obvious meaning, but that he was ignorant of facts which now make it much more important than at the time he imagined it to be. The use of the words "said" and "aforesaid" are the links by which the appellant seeks to connect the whole range of the covenant with the judgment merely, because incidentally the debt is described by reference to the judgment confessed to secure it, but the terms employed pass

beyond the judgment merely in two ways. They relate to the indebtedness, using that broad expression continually, and describing it as that of the late firm, and then they pass beyond the judgment debtors and embrace all the members of the late firm other than the one excepted member. It seems to me very clear that the release cannot be limited to the judgment debtors alone, but does discharge every member of the dissolved firm except Whitaker.

But the appellant next changes his position and assails the release for fraud. I am not sure that he has left himself the right to assume that attitude. In his complaint he sets up the release as forming no obstruction to his remedy. He does not allege it to be fraudulent. He does not ask any relief against it. He seeks neither to reform it nor to rescind it. On the contrary he assumes its validity and plants himself upon its construction. Possibly he might have omitted all reference to it and left himself free to fight it on any ground when it appeared as a matter of defense. But he did not choose to do that, and, by the form of his pleading, admits the validity of the release, but claims that it failed to cover the liability of the dormant partner. He now seeks to change position without any amendment of his pleading, and after more or less misleading his adversary. And, even at the close of the evidence, when a motion is made for a nonsuit, he does not ask to go to the jury on any question of fraud. He was not bound to ask it, I grant, but his omission indicates that he had not yet changed the issue raised by his pleading. Yet the evidence on which he relies is in the case, though taken under the defendants' objection, and it would be at least a narrow and perhaps a doubtful conclusion to dispose of it as a matter of pleading, except in so far as the questions raised are consistent with the assumed validity of the instrument. For I do not understand now that the appellant claims to rescind for fraud. It is difficult to see how he could do so in view of the fact that he retains the fruits of his arrangement and is holding on to the money of Agate, knowing it to be his, and which was

paid for the very release assailed ; but it is sufficient to say that the point in the appellant's brief which goes upon a rescission for fraud was formally withdrawn on the argument, and leaves open only the questions of estoppel and of reformation.

I can see no ground of estoppel. The claim in that direction is only a disguised form of the abandoned effort to rescind, for what is asked is that, on the ground of fraud, the instrument shall not have its legal construction as to Agate, or in substance and effect to annul and rescind the discharge as against him. Calling it estoppel does not modify its character as rescission. And since the instrument is to stand and is not to be rescinded as between the litigating parties, the office of an estoppel must necessarily be to prevent the defendants from putting the intended and legal construction upon the instrument. But the form and shape of the release was the work of Agate through his attorney, Root. Neither at that time made any representation at all. Six months before Root, for the purposes of a confession of judgment, had given the names of the firm, not mentioning Agate. There is not a particle of proof that Root at that time represented anybody but the three known partners or had the least authority from Agate, or knew of a single fact which would tend to make the latter liable as a partner. Root told the truth as he understood it, but, at all events, never represented Agate or had any authority to represent him until the date of the release. It was then, for the first time, that Root acted for Agate or by his authority as a matter of fact, and an estoppel for fraud which shuts out the truth in the interest of justice should not be based upon some constructive authority having no foundation in fact. Indeed, I think the suggestion of an estoppel is entirely inapplicable to the situation. The doctrine I understand to be that where a party, by conduct or words, represents one state of facts, knowing or intending that the other party will or shall rely upon them as true, and shape his conduct by them, which representations are untrue, the party making them shall not thereafter be allowed to show their untruth or contradict the statement of fact by which he

induced the action of the other party. Now, the representation here, stated in its broadest possible form, was that Agate was not a member of the firm. An estoppel would simply prevent a denial of that assertion and compel Agate to adhere to it. But he is not seeking to prove the contrary. He adheres to it still. He proves nothing inconsistent with it, for the release itself, legally construed, involves neither an admission nor assertion by Agate that he was a member. It guards against such an assertion by others and shuts off from litigation a denial of the truth of the representations by making such denial useless.

Nor is there furnished by the facts any ground for what is called a reformation of the instrument. This again is a disguised effort to rescind the release, wholly and utterly, as between Harbeck and Agate. There is not even a claim that there is a single word in it which both parties did not understand and entirely and fully agree should be there. It expresses the agreement as at the time actually made. The real trouble is not that it does not contain the actual contract made, but that the plaintiff might not have made it if he had inquired about the facts and been told the truth. A reformation can only be permitted in any case by a decree in equity. There is no pleading to justify it — no such relief asked for — and the attitude of the plaintiff does not admit of it. On the witness stand he says: "I have never offered to pay back the \$3,000 paid me on taking this release. I hang on to that of course. * * * I hang on to those four notes. * * * I will collect those notes if I can." And yet, holding the fruits of the agreement, and refusing their surrender, he seeks to reform it out of existence, to annul it utterly as a contract operative between himself and Agate. There is no basis for any such reformation.

There is a further proposition suggested. Authorities are cited to the purport that where one deals with a known member of a firm, so as to discharge him, the release does not operate to set free an unknown and dormant partner. The case specifically relied on is that of *Robinson v. Wilkinson* (3

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Price Exch. 538). What it holds is applicable only to a case where no release actually discharging the dormant partner has been executed, but his discharge is claimed under the common-law rule that a discharge of one is a discharge of all. That was the legal inference from the act and, possibly, was not invariably drawn in behalf of a dormant or unknown partner. But here the discharge comes not from a legal inference, which may be restrained or modified, but from an express covenant to release the dormant partner. The question is not one of inference from ambiguous acts, but of an actual contract for a discharge.

It is unnecessary to discuss other questions argued, and the judgment should be affirmed, with costs.

All concur.

Judgment affirmed. _____

FRANK SAUMBY, an Infant, etc., Respondent, v. THE CITY OF ROCHESTER, Appellant.

In an action to recover damages for personal injuries resulting from defendant's negligence, it appeared that about six months after the accident causing the injury plaintiff's eyes began to be affected, he being unable to see clearly. Plaintiff went to a doctor, who told him the trouble was far-sightedness, which the use of glasses would remedy. An expert oculist called by defendant testified that he had examined plaintiff's eyes and that they were wholly uninjured, but far-sighted. The court was asked on behalf of defendant, but refused, to charge that there was no evidence justifying the jury in finding that the condition of plaintiff's eyesight was attributable to the injury. *Held*, error; that the question was one entirely outside of ordinary experience and only capable of being answered by scientific skill, and, as this answer was adverse to plaintiff's claim, there was no question for the jury.

Saumby v. City of Rochester (72 Hun, 489), reversed.

(Argued January 24, 1895; decided February 26, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 20, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This action was brought to recover damages for injuries received by plaintiff by reason of the alleged negligence of defendant in failing to guard an excavation made by it in one of its streets.

The facts, so far as material, are stated in the opinion.

Thomas Raines for appellant. The court erred in refusing to grant the defendant's motion for a non-suit. (*Tucker v. N. Y. C. & H. R. R. R. Co.*, 124 N. Y. 308; *Reynolds v. N. Y. C. & H. R. R. R. Co.*, 58 id. 248; *Wendell v. N. Y. C. & H. R. R. R. Co.*, 91 id. 420; *Tucker v. N. Y. C. & H. R. R. R. Co.*, 124 id. 308; *Lennon v. N. Y. C. & H. R. R. R. Co.*, 65 Hun, 578; *Walker v. Town of Reidsville*, 96 N. C. 382; *Parker v. City of Cohoes*, 74 N. Y. 610.) The exception to the refusal of the request to charge that there is no evidence in this case which would justify the jury in finding that the condition of the plaintiff's eyesight, aside from any twitching of the lids, is attributable to the injury from this accident is well taken. (*Leitch v. A. M. Ins. Co.*, 66 N. Y. 108; *Cornish v. F. B. F. Ins. Co.*, 74 id. 298; *Frale v. N. Y., L. E. & W. R. R. Co.*, 143 id. 188.)

P. Chamberlain, Jr., for respondent. The notice of claim served upon the city was sufficient under the provisions of the statute. (Laws of 1890, chap. 561, § 18; *Paddock v. City of Rochester*, 39 N. Y. S. R. 682.) The defendant's negligence and liability was fully proven and properly submitted to the jury. (*Bruso v. City of Buffalo*, 90 N. Y. 608; *Groves v. City of Rochester*, 39 Hun, 5; *Wilson v. City of Troy*, 135 N. Y. 96.) The question of plaintiff's contributory negligence was properly submitted to the jury. (*Pettingill v. City of Yonkers*, 116 N. Y. 588; *Morrison v. B. & S. A. R. R. Co.*, 130 id. 66; *Clifford v. Dam*, 81 id. 52.)

FINCH, J. The evidence in this case raised questions of fact for the jury, both as to the alleged negligence of the defendant and the absence of contributory negligence on the part of the plaintiff. Neither question could be answered as

one purely of law. In the process of paving a street with asphalt and laying the necessary sewers, the agents of the city made an excavation in the unflagged portion of the sidewalk, next to the curb, and there is proof tending to show that it was left unguarded. The plaintiff, who was about thirteen years of age, fell into it and was injured. The accident occurred in the early dusk of the evening, and it is probable that the plaintiff stumbled over the earth about the opening and in his fall struck his face against the curb, for one tooth was broken off another driven up into his jaw, and his lip seriously cut.

But there was manifest error in the refusal of the court to charge upon the question of damages as requested by the defendant. A claim was made on the part of the plaintiff that the injury had harmed his eyes and affected his sight. There was no adequate proof of any such fact. It appeared that about six months after the accident the plaintiff's eyes began to be affected. There was a twitching of the lids and an inability to see clearly. He went to Dr. Rider, who told him that the trouble was far-sightedness, which glasses would remedy, and he has used them more or less from that time. The plaintiff did not call Dr. Rider. The defendant called Dr. Burke as an expert oculist. He had examined plaintiff's eyes with an ophthalmoscope, and pronounced them wholly uninjured, but far-sighted. He added that the difficulty was congenital, but might not reveal itself until some age was reached or some occupation trying to the eyes was adopted. On that state of facts there was no proof whatever that injury to the eyes came from the accident. That it developed after the event shows only a sequence in point of time, and not necessarily one of cause and effect. In that state of the proof the court was asked to charge on behalf of the defendant that there was no evidence in the case which would justify the jury in finding that the condition of the plaintiff's eyesight, aside from any twitching of the lids, is attributable to the injury from the accident. The request was refused and the defendant excepted to the refusal. As a result, the jury were allowed to guess or imagine that

plaintiff's defect of sight was caused by the accident, simply because it supervened after the occurrence, and in the face of the uncontradicted evidence of the expert to the contrary. The question was one entirely outside of ordinary experience and only capable of being answered by scientific skill, and that answer was adverse to the plaintiff's claim. There is often, in this class of cases, a tendency to aggravate in the proof the consequences of an injury with a view to enhance the damages, and the tendency is one quite difficult for a defendant to protect himself against. While a plaintiff should be always allowed in a proper case to show fully the damage which he has suffered, he should not be permitted to prove physical defects, having no known or proven connection with the injury, simply because they manifested themselves at some time thereafter, and then to ask the jury to supply from their imagination the lack of proof. That was permitted in this case, and it was an error for which the judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except HAIGHT, J., not sitting.

Judgment reversed.

JACOB HIRSHFELD, Appellant, v. JOHN BOPP et al.,
Respondents.

A creditor of a domestic banking corporation, seeking to charge a stockholder under the statute, is bound to allege and prove all the facts upon which the liability depends; he must aver the performance of conditions precedent, or set forth facts which in law excuse their performance.

Under the section of the Banking Law (§ 52, chap. 689, Laws of 1892) which provides that "except as prescribed in the Stock Corporation Law," the stockholders of a banking corporation shall be individually responsible for its debts to the extent of the amount of their stock, etc., the provisions of the Stock Corporation Law, having general application, which relate to the liability of stockholders in corporations, are to be considered as incorporated in the section, and the words "except as prescribed in" are to be construed as though the language was "subject to the limitations in."

The liability, therefore, of a stockholder of a banking corporation is subject to and limited by the conditions affixed to the liability of stock-

145	84
146	58
145	84
147	612
145	84
157	185
145	84
162	190

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holders prescribed by the "Stock Corporation Law" (§ 55, chap. 688, Laws of 1892), i. e., (1) the recovery of a judgment against the corporation for the debt and the return of an execution thereon unsatisfied; (2) that the debt was payable within two years from the time it was contracted; (3) that the action against the corporation was brought within two years after the debt became due, and, if the action is brought against a stockholder after he ceased to be such, that it be brought within two years after that time.

The complaint in an action brought by a creditor of a banking corporation, in his own behalf and that of other creditors, against stockholders, neither averred the recovery of a judgment against the corporation for the debt owing to plaintiff, nor that action has been brought thereupon against it, and there were no proper allegations in the complaint setting forth an excuse for the non-performance of that condition. There was no averment as to the time when the debts owing by the bank were contracted, or that they were payable within two years. *Held*, that a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, was properly sustained.

It seems, that when an action has been brought by the People against such a corporation, and a judgment has been rendered therein dissolving it, sequestrating its property, appointing a receiver, and restraining creditors from bringing suit against it, this is an excuse for the non-performance of the condition precedent requiring a judgment against the corporation and the return of an execution unsatisfied.

It seems, also, that when the insolvency of the corporation has been judicially declared, and all its assets are in the custody of the law for equal distribution among creditors, an action in equity, brought in behalf of all the creditors, against the stockholders, to enforce their liability, in which the receiver is joined as defendant, is a just and reasonable method of ascertaining and having finally determined the respective liabilities of the stockholders.

While the Banking Law changes in some respects the method of enforcing the liability of stockholders, it does not change its essential character from what it was under the prior law (Chap. 226, Laws of 1849; chap. 469, Laws of 1882), and imposes no new liability.

The act, therefore, is not unconstitutional, as applicable to stockholders who became such prior to its passage, and it is not necessary to allege in a complaint against stockholders that they became such after the passage of the act.

Reported below, 81 Hun, 555.

(Argued January 28, 1895; decided February 26, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 16, 1894, which affirmed an inter-

locutory judgment in favor of defendants entered upon an order of Special Term sustaining a demurrer to the complaint.

This action was brought by a creditor of the Madison Square Bank, an insolvent banking corporation organized under the banking laws of this state, now in the hands of a receiver, to enforce an alleged liability of the defendants, stockholders in said bank at the time of the appointment of the receiver, to the creditors of the corporation under sec. 52 of the Banking Law, chap. 689 of the Laws of 1892. The plaintiff sues on his own behalf and in behalf of all other creditors similarly situated. The defendant Kursheedt and others demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained at Special and General Terms and from the judgment sustaining the demurrer this appeal is taken. The complaint alleges that the Madison Square Bank was a domestic banking corporation, but does not allege when it was organized. It alleges that on the 1st day of August, 1893, the People commenced an action in the Supreme Court against the bank for its dissolution, on the ground, among others, of insolvency, and that November 24, 1893, judgment was entered thereon dissolving the corporation and forfeiting its corporate franchises and providing for the distribution of its assets among its creditors, and restraining its several creditors from instituting any action against it, and appointing receivers with the usual powers of receivers in such cases, and that the receivers had duly qualified and entered upon the performance of their duties. It alleges that the bank issued its capital stock of \$500,000, which was divided into 5,000 shares of \$100 each, and that at the time of the commencement of the People's action and the rendition of the judgment therein, the defendants were stockholders holding respectively the number of shares specifically set forth in the complaint. There is no allegation as to the time when the several defendants became stockholders or whether they were stockholders at or prior to the enactment of the Banking Law of 1892. It alleges that prior to the commencement of the People's action the plaintiff had deposited with the bank

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moneys belonging to him amounting to \$5,334.41, for which the bank was indebted to him on that day, and that no part of the same has been re-paid except the sum of \$1,309.85, and that there is now due and owing to him from the bank the sum of \$4,024.56, with interest from August 10, 1893 (the day of the commencement of the People's action), although payment has been often requested of said bank. There is no allegation of the time when the deposit was made, except the allegation that it was prior to the commencement of the People's action, nor of the terms of the deposit, whether special or otherwise, nor of the time when a cause of action against the bank accrued. It alleges that the assets in the hands of the receivers are wholly inadequate to pay the creditors of the bank in full, and that after the application of all the assets to the payment of the debts, there will remain a deficiency owing to creditors, exceeding the sum of \$500,000. The complaint then sets forth that by reason of the premises the stockholders (defendants) have become individually responsible to the plaintiff and the other creditors of the bank equally and ratably, and not one for the other, for all the contracts, debts and engagements of the corporation to the extent of the amount of stock severally held by them at the time of the commencement of the action, at the par value thereof, in pursuance of the provision of the statute in such case made and provided. It alleges that the receivers (who are joined as defendants), although requested by the plaintiff to institute an action to enforce the liability of the stockholders, had declined so to do, on the ground that the right to enforce such liability did not vest in them as receivers. The complaint demands judgment against the several stockholders on the statutory liability alleged, and for an adjustment of the claims of the respective creditors and for the payment of the fund received to the receivers for equitable distribution, and for such other and further relief as should be equitable.

Louis Marshall for appellant. The proposition that an action cannot be maintained under the provisions of section

52 of the Banking Law unless the conditions specified in section 55 of the Stock Corporation Law are complied with, is unsound. (Code Civ. Pro. § 1806; *F. N. Bank v. Lamb*, 50 N. Y. 95.) Assuming that a limitation upon the stockholders' liability created by section 52 of the Banking Law, similar to that specified in section 55 of the Stock Corporation Law, has been created, there is no reason why the liability under the Banking Law cannot be enforced, even though no judgment has been recovered against the corporation on behalf of any creditor for the amount of his claim and no execution thereon has been returned unsatisfied. (*McCulloch v. Norwood*, 58 N. Y. 562; *Platt v. Ashman*, 32 Hun, 230; *Gold v. Clyne*, 58 id. 419; *A. N. Bank v. Wendell*, 64 id. 208; *Shellington v. Howland*, 53 N. Y. 371; *Kincaid v. Dwinelle*, 59 id. 548; *Flash v. Com.*, 109 U. S. 71; *Hardman v. Sage*, 124 N. Y. 25, 31; *N. T. Bank v. Wetmore*, Id. 241; *Payne v. Gardner*, 29 id. 146; *Howell v. Adams*, 68 id. 314; *Boughton v. Flint*, 74 id. 476, 482.) The act of 1892 is constitutional and applicable to this corporation, although it was incorporated and its stock issued prior to the passage of the Banking Law, and the act under which it was incorporated imposed no liability upon its stockholders. (*In re L. & C. Bank*, 21 N. Y. 9; *Miller v. State*, 15 Wall. 478-493; *Holyoke Co. v. Lyman*, 15 id. 519; *R. R. Co. v. Maine*, 96 U. S. 510; *Sinking Fund Cases*, 99 id. 700-719; *N. Y. C. Co. v. C. S. R. R. Co.*, 40 Hun, 29-31.) The claim that the language of section 52 of the Banking Law clearly excludes from its purview a corporation existing prior to 1892 is also without foundation. (*In re L. & C. Bank*, 21 N. Y. 9.) The remedy chosen in the present case is the proper one. (*Mathez v. Neidig*, 72 N. Y. 100; *Griffith v. Mangam*, 73 id. 611; *Pfohl v. Simpson*, 74 id. 137; *Weeks v. Love*, 50 id. 571.) The action is maintainable at this time, notwithstanding the fact that it may not have been ascertained with absolute definiteness to what extent the assets of the corporation will be insufficient to pay the claims of creditors. (*Walton v. Coe*, 110 N. Y. 109.) The receivers were

properly made defendants in this action for the purpose of enabling the court, if it deemed it desirable to do so, to make use of the receivership as a means of adjusting the claims of creditors and distributing among them the moneys realized from the stockholders in this action. (*Greaves v. Gouge*, 69 N. Y. 154; *Hawes v. Oakland*, 104 U. S. 450)

Joseph Fettretch for respondents. This action cannot be maintained. (Laws of 1892, chap. 689.) The obtaining of a judgment against the bank and return of the execution thereon unsatisfied, in whole or in part, were conditions precedent to the plaintiff's right to maintain any action on the alleged debt of the bank against the defendants as its stockholders. (*Handy v. Draper*, 89 N. Y. 334; *R. M. N. Bank v. Bliss*, Id. 342.) There is no allegation in the complaint that the plaintiff did anything which would excuse him from alleging the conditions precedent of a recovery of a judgment against the corporation and issuing execution thereon, even if under the law under discussion this would avail anything. The absence of such allegation is fatal. (*N. T. Works v. Ballou*, 146 U. S. 517.) Had the making of a preliminary injunction and the appointment of temporary receivers been alleged it would not have helped the plaintiff, for, notwithstanding any such allegations, the plaintiff would not have been excused from alleging the performance of the conditions precedent, as to judgment and execution, for at least until the final judgment he could have proceeded with the permission of the court (if not without it) to put himself in position to maintain his action against stockholders. (*Mason v. N. Y. S. M. Co.*, 27 Hun, 307; *B. N. Bank v. Mosser*, 14 id. 605; *Lindsley v. Simonds*, 2 Abb. Pr. [N. S.] 69; *Chamberlin v. H. Mfg. Co.*, 118 Mass. 532-536.) Whatever the construction of section 24, chapter 40, Laws 1848, the respondents submit that under section 55, chapter 688, Laws 1892, the plaintiff cannot maintain any action against the defendants without alleging the commencement of an action against the corporation and the issuing and return of execution thereon unsatisfied in whole or in

part. (Laws of 1892, chap. 688, § 55; *People v. Coleman*, 126 N. Y. 450; *Karst v. Gane*, 136 id. 321.) The stockholders' liability is statutory, and the legislature had the right to provide the manner of its enforcement, and having so provided, even though it may work a hardship in some cases, yet the provisions must be complied with before any liability can be enforced. (*Terry v. Little*, 101 U. S. 216, 217.) The legislature intended to enact that in no case could any recovery be had against the stockholder of a corporation, on any debt due by the corporation, where the creditor did not, before bringing his suit against the stockholder, recover a judgment against the corporation, and issue execution thereon, and have the same returned. (Laws of 1892, chap. 688, § 55.) The allegation that on a certain day the Madison Square Bank was indebted to the plaintiff is not the allegation of a fact, but of a mere conclusion of law, and is dependent upon the facts as to whether, as a conclusion of law, it is correct. These facts the plaintiff was bound to allege, and in such a form as to show that a liability exists on the part of the defendants Kursheedt in favor of the plaintiff. (*Dean v. Mace*, 19 Hun, 391; *Handy v. Draper*, 89 N. Y. 334.) The complaint must show that the alleged corporate debt was contracted subsequent to the passage of the act of 1892, or, if not, that then the Madison Square Bank, prior to its insolvency, issued bank notes or some kind of paper credits to circulate as money. (*In re Bank*, 21 N. Y. 20; *Cook on Stock & Stockholders*, § 497; 2 *Morawetz on Corp.* §§ 1078, 1099.)

ANDREWS, Ch. J. Section 52 of "The Banking Law" of 1892, is prefaced by the words, "Individual liability of Stockholders," and then proceeds as follows: "Except as prescribed in the Stock Corporation Law, the stockholders of every such (banking) corporation, shall be individually responsible equally and ratably and not one for another, for all contracts, debts and engagements of such corporation to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares." The next and

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final clause of the section defines the term "stockholder" as including every owner of stock, legal or equitable, although not standing in his own name on the books of the corporation, but not a person who holds such stock as collateral security for the payment of a debt. The complaint is based on this statute, and no other ground of liability has been claimed on the argument, nor so far as we know is there any legislation which imposes liability upon stockholders of banks for the debts of the corporation, other than the statute of 1892. The liability imposed by art. 8, sec. 7, of the Constitution is limited to stockholders in banking corporations or associations, "issuing bank notes, or any kind of paper credits to circulate as money." It is well known that state banks, while invested with the power of banks of issue on complying with certain conditions, are by the operation of the provisions of the United States laws relating to national banks, practically prohibited from the exercise of this power, and not only is there no averment in the complaint that the Madison Square Bank was engaged in "issuing bank notes or any kind of paper credits to circulate as money," but there can be no reasonable doubt that it was not so engaged. The constitutional provision has, therefore, no application, and the liability of the stockholders rests exclusively upon the statute of 1892.

The 52d section of the Banking Law does not purport to impose an absolute and unconditional liability upon the stockholders of state banks. The imposition of such a primary liability, without requiring creditors to first exhaust their remedy against the corporation, would be a reversal of the policy of prior legislation prescribing the liability of stockholders of banks or other corporations. The almost uniform practice has been to make the liability of stockholders for the debts of the corporation subsidiary and consequent upon the inability of creditors to secure payment of their debts from the corporation itself. The act of 1849 (Chap. 226), "to enforce the liability of stockholders in banking corporations," prescribed a system by which the liability was enforced through the receiver in case of the insolvency of the bank. There was

some obscurity in the act in respect to the point whether stockholders could be compelled to respond before the receiver had collected and applied the assets in his hands, and the court in the case *In re Reciprocity Bank* (22 N. Y. 9-14) held that the stockholders could not be called upon to contribute until the whole available assets of the bank had been collected and applied upon the debts of the bank. This was regarded as the just rule in view of the secondary character of the liability of stockholders and a construction was given in conformity with it. The act of 1849 was in substance incorporated into the revision of the Banking Laws in 1882 (Chap. 469), and the same principle prevailed thereafter under that act as under the act of 1849, that the assets should be first applied and a deficiency be ascertained before the liability of stockholders could be enforced. The act of 1882 was repealed by sec. 216 of the Banking Law of 1892, and the system which prevailed under the acts of 1849 and 1882 was not re-enacted. It is said that the revisers who reported the Banking Act of 1892 also reported a "receivers' law" covering the subject, but for some reason it was not adopted by the legislature. It will be generally found that where, by legislation in this or other states, stockholders have been subjected to liability for the debts of corporations, after the stock has been fully paid in and certified, this liability is regarded as secondary and not primary, and can only be enforced after the remedy against the corporation has been exhausted. In construing section 52 of the Banking Law of 1892, this principle founded in reason and justice must be remembered, and very clear indication of a legislative intention to disregard it should be found, before reaching a conclusion that the section operates to impose upon stockholders in banks a primary liability which may be enforced without resorting in the first instance to the corporation, and irrespective of other limitations which have usually been attached as conditions precedent to the liability of stockholders. The words in section 52 of the Banking Law, and with which the section commences, "Except as prescribed in the Stock Corporation Law," manifestly incorporate into the section such

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provisions of the Stock Corporation Law, having general application, which relate to the liability of stockholders in corporations. It was very justly said by the General Term that banking corporations were included in the general sections of the Stock Corporation Law. Section 52 of the Banking Law expressly refers to the Stock Corporation Law, and the whole scheme of legislation relating to corporations contained in the three acts, "The General Corporation Law," "The Stock Corporation Law" and "The Banking Law," all passed on the same day, show that many of the general provisions in the "Stock Corporation Law" are applicable to banking as well as to other corporations. Sec. 55 of the "Stock Corporation Law," entitled "Limitations of Stockholders' Liability," affixes three conditions to the liability of stockholders to an action: (1) The recovery of a judgment against the corporation for the debt, and the return of an execution thereon unsatisfied in whole or in part; (2) that the debt was payable within two years from the time it was contracted; (3) that the action against the corporation for the debt is brought within two years after it became due, and if the action is brought against the stockholder after he ceased to be a stockholder, it must be brought within two years after that time. The language of the section is general. It declares that "No action shall be brought against a stockholder for any debt of the corporation until," etc. The section is dealing with stock corporations, in which a banking corporation is included, and the limitations apply to the stockholders in such a corporation. These limitations are consistent with the general purpose of the prior legislation requiring proceedings to be first taken to collect the debt of the primary debtor, although they extend to the stockholders in banks exemption founded upon the period of credit and the time of commencing the action against the corporation, not given by the Laws of 1849 and 1882. Reading section 52 of the Banking Law in the light of section 55 of the Stock Corporation Law, we think the words of section 52, "Except as prescribed in the Stock Corporation Law," are to be construed as though

the language was "Subject to the limitations in the Stock Corporation Law, the stockholders of every such corporation shall be individually responsible," etc. It is insisted that the words in section 52 refer to section 54 of the Stock Corporation Law, and not to section 55. This contention is inadmissible. Section 54 is a section imposing, and not limiting liability, and relates to stockholders in other than banking corporations. The liability of stockholders in banking corporations is prescribed in section 52 of the Banking Act. The general policy of legislation in respect to the liability of stockholders in other corporations has been to make them liable to general creditors until the whole amount of capital stock of the corporation has been paid in, and no longer, and to make the liability absolute as regards debts owing by the corporation to laborers, servants and employees. This liability is declared in section 54. If section 54 is held to apply to stockholders in banks, they are to a great extent released from the liability which since 1849 has been imposed upon them. It is not reasonable to suppose that this could have been the intention of the legislature, and such a construction of section 52 is inconsistent with its broad language. We think the liability imposed by section 52 of the Banking Law is limited by section 55 of the Stock Corporation Law.

A creditor seeking to charge a stockholder under the statute, is bound to allege and on the trial to prove all the facts upon which the liability depends. He must aver the performance of conditions precedent, or set forth facts which in law excuse their performance. (*Cuykendall v. Corning*, 88 N. Y. 130, 137.) The complaint neither avers that any judgment has been recovered against the corporation for the debts owing to the plaintiff, nor that any action has been brought thereupon against it, and there is no averment as to the time when the debts owing by the bank were contracted, nor that they were payable within two years from that time.

In respect to the objection that the complaint does not show that the precedent condition that judgment should first be obtained against the corporation for the debt and execution

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issued and returned unsatisfied, it is claimed in behalf of the plaintiff that its performance was excused by the judgment in the People's action, dissolving the corporation and restraining creditors from suing. On the other side it is insisted that the liability of stockholders being purely statutory, performance is a necessary condition, without which no action can be maintained, and that no disability to sue the corporation, whether arising from the act of the law, or from any other cause, can excuse its performance. The question was argued in this court in the case of *Shellington v. Howland* (53 N. Y. 375), which was an action against a stockholder in a manufacturing corporation organized under the general act of 1848, brought by a creditor to enforce the liability imposed by that act. The statute in question in that case required that a suit should be first brought against the corporation to recover the debt, and execution returned unsatisfied. (*Handy v. Draper*, 89 N. Y. 335.) In *Shellington v. Howland* the plaintiff relied upon the fact that by force of the Bankrupt Law of the United States the prosecution of an action against the corporation was prevented and the performance of the condition became legally impossible. The plaintiff prevailed in this contention, and although it appeared that the defendant had by his own act procured the adjudication in bankruptcy, Judge ALLEN was of opinion that, irrespective of this fact, performance of the condition was excused whenever by the intervention of the law its performance became impossible. The same learned judge re-asserted this view in *Kincaid v. Dwinelle* (59 N. Y. 548), although not essential to the decision rendered. In *Hardman v. Sage* (124 N. Y. 25-32) the question was considered, and FOLLETT, Ch. J., expressed an opinion in accordance with the view of Judge ALLEN, but the case was decided against the plaintiff on another ground. But in the case of *Hunting v. Blun*, recently decided in this court (143 N. Y. 511), the question was necessarily involved and expressly decided, and it was held that a judgment sequestrating the property of a corporation and appointing a receiver, accompanied by an injunction restraining creditors from suing

the corporation, excused a creditor in a suit brought against a stockholder, from the performance of the precedent condition that suit should first be brought against the corporation and an execution returned unsatisfied. The decision in *Hunting v. Blun* puts at rest the question. If it was necessary to find reasons supporting this decision, they are obvious. The liability imposed upon stockholders, although varying in extent under various statutes (the liability in case of some corporations being more stringent than in others), is imposed for the benefit of creditors. This security would be of little practical value under the opposite doctrine. The insolvency of a corporation and the appointment of a receiver, accompanied by a restraint upon creditors, are facts which in most cases become known to creditors only when the final act is consummated and a receiver has been appointed. The situation which makes a resort to the liability of the stockholders essential to the creditor, would become known to him in most cases when it is too late to enforce it, if it should be held that a disability imposed by law does not excuse the bringing of a suit against the corporation. Moreover, in many cases the debt may not be due, so that an action could not be brought by the creditor against the corporation prior to the insolvency and the falling of the bar which makes the bringing of an action legally impossible. The object of the provision requiring the creditor to exhaust his remedy in the first instance by judgment and execution against the corporation, is to protect the stockholder against being called upon until an effort to collect of the principal debtor is shown by legal proceedings to be unavailing. But when insolvency has been judicially declared and the whole assets of the corporation are in the custody of the law for equal distribution among creditors, an action in equity brought in behalf of all the creditors against the stockholders to enforce their liability, in which the receiver is joined as defendant, would seem to be a just and reasonable method of ascertaining and having finally determined their respective liabilities. The whole matter is before the court and it can mould its decree according to the equity of the case. We are

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of opinion, therefore, that under proper allegations in the complaint setting forth the grounds of excuse, the fact that no suit had been brought against the corporation would not be an insuperable difficulty in the way of the plaintiff.

The complaint alleges nothing in terms as an excuse for the non-performance of this condition. It does not state whether a suit had been brought or judgment recovered. The fact that the debt had become due before the People's action was commenced, and that suit might have been brought upon it before that time, would not we conceive prevent the plaintiff from interposing the insolvency proceedings and judgment dissolving the corporation as an excuse for non-performance of the condition, provided the right to sue continued and existed when the decree of dissolution was entered. The complaint does allege the rendition and terms of the decree in the People's suit, but the situation of the plaintiff's claims before or at the time of the decree is left to vague inference. The complaint should have stated when the plaintiff's debt was contracted, whether it was presently due, or, if credit was given, the time of the credit, and why the bringing of a suit against the corporation was prevented. In short it should have stated facts showing that the debt was payable within two years from the time it was contracted; that suit thereon against the corporation was brought within two years after it became due, and that judgment had been recovered therein and execution thereon returned unsatisfied, or in the alternative the facts which excused the bringing of such suit and the recovery of a judgment. The demurrer was, we think, well taken for the omission to aver in the complaint these essential facts.

The additional claim is made that it should have been shown by the complaint that the defendants became stockholders in the corporation subsequent to the passage of the act of 1892, on the ground that if they became stockholders prior to that time, the act imposing liabilities would, as to them, be unconstitutional. (See *Comm. v. Cochituate Bank*, 3 Allen, 42; *Wheeler v. Frontier Bank*, 23 Me. 308; *In re Bank*, 21 N.

Y. 20-22; 2 Morawetz on Cor. §§ 1078, 1099.) It is a sufficient answer that the statute of 1892, while it changed in some respects the method of enforcing the liability of stockholders in banks, did not change its essential character from what it was under the statutes of 1849 and 1882. The statute of 1882 remained in force until 1892, and was repealed by the same act which embodied the liability contained in section 52 of the Banking Law. Under both acts stockholders are liable to the same extent, and a change in the methods of enforcing it is not the imposition of a new liability.

Upon the grounds stated the judgment of the courts below should be affirmed, with leave to the plaintiff to amend on payment of costs in all courts.

All concur.

Judgment affirmed.

In the Matter of the Judicial Settlement of the Accounts of
THOMAS J. MULLON et al., as Administrators, etc.

A creditor, having an unpaid debt against a decedent, not barred by the Statute of Limitations, is not precluded by a mere omission to present his claim, pursuant to notice, from establishing his debt and demanding an accounting at any time before the executor or administrator is formally discharged from his trust.

Where, however, an executor, who is also residuary legatee, after having paid all claims under the will and all claims presented in usual course pursuant to the notice, and, acting in good faith, applies to his own use the assets remaining, he can only be held accountable for the actual value of such assets, and cannot be charged with the profits of a business in which he has put such assets.

While the inventory and appraisal filed by the executor, are not conclusive as to the extent or value of such assets, they are *prima facie* evidence thereof, and the burden is upon the contestant seeking to surcharge the account to show that articles were omitted or that a greater sum was realized than the appraised value.

M., who had been carrying on the ice business, died leaving a will by which his sons were made residuary legatees. After their father's death the sons took possession of said property and thereafter carried on the ice business as co-partners. The executors named in the will having renounced, the sons were appointed administrators with the will annexed. They filed an inventory of the estate including therein the ice plant, tools

and fixtures formerly used by the testator in said business and the stock on hand. They, pursuant to an order of the surrogate, caused notice for the presentation of claims to be duly published, and paid in full the claims presented, also the specific legacies and funeral expenses. The payments thus made exceeded by more than \$2,000 the whole appraised value of the estate. Five years thereafter the sons sold the business and the property connected therewith. The bill of sale included many articles purchased by the sons after the death of M., existing contracts for the sale of ice, and the stock of ice then on hand, which was on premises leased by them and in which the testator never had any interest. The bill of sale also contained a covenant on the part of the vendors not to engage in the ice business for ten years without the consent of the vendee. In an action for the foreclosure of a mortgage given by M., a deficiency judgment was rendered after the sale so made by the sons, against them as administrators. Upon an accounting in proceedings instituted by the judgment creditor, the administrators charged themselves with the appraised value of said ice plant, tools and machinery as stated in the inventory. It was not shown that any of the testator's personal property was omitted from the inventory, or that any article therein named was appraised at less than its full value; but the creditor claimed and the surrogate decided that as no accounting was had and the administrators continued the business, using therein the property used by the testator without any formal transfer of title, the business, its profits, accretions and proceeds belonged to the estate, and the administrators were surcharged with the difference between the inventoried value of said property and the sum received by them on the sale. *Held*, error. Reported below, 74 Hun, 358.

(Argued January 29, 1895; decided February 26, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made December 6, 1893, which reversed a decree of the surrogate of the county of Albany upon an accounting by Thomas J. Mullon and Jacob H. Mullon, as administrators with the will annexed of John Mullon, deceased, and granted a new trial.

This proceeding was instituted by William Bayard Van Rensselaer, as trustee for Laura Van Rensselaer, said trustee claiming that a judgment for deficiency on the foreclosure of a mortgage should be paid to his *cestui que trust* by the administrators.

The facts, so far as material, are stated in the opinion.

Marcus T. Hun for appellant. Administrators are not authorized to convert to their own use, immediately upon the death of the testator, such of the property of the estate as they may elect to purchase of themselves at the inventory prices. (*Blood v. Kane*, 130 N. Y. 514.) The obligation, existing on the part of the creditor, to surcharge the account was fully met by the proof offered by him upon this subject. (*Dorney v. Thacher*, 76 Hun, 361; *Forbes v. Halsey*, 26 N. Y. 53; *Blood v. Kane*, 130 id. 518.) The administrators, having created a confusion of assets of the testator's estate with what they claimed to be their own, were bound to identify each in kind and value, and show specifically what part, if any, of the proceeds of sale represented the consideration paid for each. (*Hart v. Ten Eyck*, 2 Johns. Ch. 62; *Silsbury v. McCoon*, 3 N. Y. 379; *Hannahs v. Hannahs*, 68 id. 610.) The judgment creditor has been guilty of no *laches* in the enforcement of this claim. (1 R. S. 749, § 4; *Halsey v. Reed*, 9 Paige, 446; *Johnson v. Corbett*, 11 id. 265; *Williams v. Eaton*, 3 Redf. 503.) The questions of fact are reviewable in the Court of Appeals. (*Hewlett v. Elmer*, 103 N. Y. 156-166; *In re Sprague*, 125 id. 732.) The objections filed against the administrators' accounts were specific and sufficient. (*Dorney v. Thacher*, 76 Hun, 361; *In re Hart*, 60 id. 516.)

John A. Stevens for respondents. The surrogate erred in his findings of fact and conclusions of law. (*Forbes v. Halsey*, 26 N. Y. 60; *Marre v. Ginocchio*, 2 Bradf. 165; *Bainbridge v. McCullough*, 1 Hun, 488.) It is in the power of the executor or administrator to protect himself by an advertisement for claims which, when duly made, will authorize distribution of the estate without personal risk to respond for judgment claims or any other demands which have not been presented under the advertisement and before distribution. (*Trust v. Harned*, 4 Bradf. 215; *In re McEvoy Estate*, 3 N. Y. Supp. 337; *Erwin v. Loeper*, 43 N. Y. 521; *Williams v. Eaton*, 3 Redf. 503.) The administrators being also the resid-

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uary legatees under the will the title to all the property was in them subject only to the rights of creditors, and after the advertisement for claims, and the payment of all the claims which came to their knowledge, their relation to the property changed from that of trustees to owners, and their title to it became absolute. (*Hudson v. Reeve*, 1 Barb. 89; *Elliot v. Kemp*, 7 M. & W. 313; *Blood v. Kane*, 130 N. Y. 517; *Merchant v. Driver*, 1 Saund. 307.) If the administrators had no right to take and use the property as their own, or to conduct the business as their own, they could only be charged with the inventoried price of the property and interest thereon until the accounting. (*Hannahs v. Hannahs*, 68 N. Y. 610; *Smith v. Weld*, 15 Wkly. Dig. 369.)

ANDREWS, Ch. J. The fundamental error in the decree of the surrogate, rendered on the accounting, is the assumption that the ice business carried on by Thomas J. Mullon and Jacob H. Mullon, from the death of their father, John Mullon, was carried on by them as administrators of his estate. Upon this assumption the surrogate reached the conclusion that the sale made by them to Sherman of the ice business and the property connected therewith was a sale of the business and property of the estate of John Mullon, and that the administrators are accountable as such for \$20,250, the consideration of the sale.

The result reached subjects the administrators to a liability much beyond the value of the assets as inventoried which came to their hands on the death of their father, and involves the implication that for nearly five years subsequent to his death, the sons devoted their time and labor in carrying on the business for the benefit of the estate. The assumption made by the surrogate is unfounded in fact and in law. There can be no doubt upon the evidence that in form the sons carried on the business for themselves as co-partners from the death of the father. They took possession of and used in the business the horses, wagons and equipments which had been used by the testator. But they carried on the business in their

own names, and in the bill of sale to Sherman they described themselves as "trading and doing business as co-partners under the firm name and style of John Mullon's Sons." Moreover, they had no reason to suppose that in so doing they were in any way defeating or prejudicing the rights of the creditors of the testator. They were the residuary legatees under his will. The executors having renounced, they were appointed administrators with the will annexed. They procured an inventory of the estate to be made and filed October 20, 1886, in which the whole personal estate was appraised at \$9,426.20, including therein the property and stock used by the testator in his ice business of the appraised value of \$6,582. On the 30th of March, 1887, pursuant to the order of the surrogate, they caused notice for the presentation of claims to be duly published, and they paid in full all the claims presented. They paid the legacies and funeral expenses, and the payments on account of the estate exceeded the whole appraised value by more than \$2,000. No claim was presented by the petitioner until about the commencement of the present proceedings for an accounting, in October, 1892. The claim then made was on account of a deficiency judgment obtained against the administrators of John Mullon for \$3,811.70, October 5th, 1892, in an action for the foreclosure of a mortgage for \$6,000, given by John Mullon in 1881, payable five years from date, to the estate which the contestant represents. Although the mortgage became due soon after the death of the mortgagor, no proceedings appear to have been taken to collect it until several years after his death, and so far as appears no claim was made or notice given to the administrators that such a debt was outstanding or that a deficiency would be likely to arise, prior to the sale to Sherman, February 28th, 1891.

But if in judgment of law the business conducted by the sons of John Mullon, after his death, was the business of the estate, and all the property used therein and sold to Sherman was the property of the estate, the understanding and intention of the persons in whose name it was carried on would be

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immaterial, and the administrators would be bound to account for the consideration of the sale, however harshly such a conclusion might operate against them. They have charged themselves in the account with the appraised value of the ice plant, tools and machinery, as stated in the inventory. It was not shown that any personal property belonging to the testator was omitted therefrom. No direct evidence was given and no attempt was made to show that any article in the inventory was appraised at less than its full value. But it is insisted that as no accounting was had, and the administrators continued the ice business, and used therein the articles used by the testator, without any formal transfer of the title from themselves as administrators to themselves as individuals, the business, its profits, accretions and proceeds belonged to the estate. The petitioner, therefore, sought to surcharge the account rendered by the administrators with the difference between \$6,582.00, the inventoried value of the ice fixtures and property, and the sum of \$20,250.00, the consideration of the sale to Sherman. The decree proceeds substantially on this claim. The injustice of this result is very obvious. It appears from the bill of sale that it embraced the good will of the business of "John Mullon's Sons;" all the personal property connected therewith, including many things purchased after John Mullon's death; existing contracts for the sale of ice; about 9,000 tons of ice collected and stored by the firm in 1890 and 1891 on premises which the firm held under a lease, and in which the testator, John Mullon, never had any interest; and the bill of sale contained a covenant on the part of the vendors, jointly and severally, that they would not for ten years engage in the ice business in the counties of Albany and Rensselaer without the consent of Sherman.

We think the administrators were not in law bound to account for the proceeds of the sale to Sherman. It is not disputed that the sale included many articles which belonged to John Mullon at his death, and which are entered in the inventory. The administrators held the assets of the estate

as trustees for creditors and legatees, and this relation, at the time of the sale, had not been terminated by any decree or judicial proceeding. The administrators having regularly proceeded by notice to creditors, were justified in using the assets to pay claims presented, and other creditors who had neglected to present their claims had no cause to complain of such payments. (*Erwin v. Loper*, 43 N. Y. 521.) Upon payment of all debts, legacies and charges against the estate, the title to the remaining assets would at once vest in the residuary legatees under the will, without any formal transfer from themselves as administrators. (*Blood v. Kane*, 130 N. Y. 518.) In the present case, although the administrators appear to have proceeded on the assumption that all claims against the estate were discharged, and thereupon treated the assets remaining as belonging to them individually, this was a mistake. Some years later, and before the administrators had applied to be discharged of the trust, the claim in question was presented. It cannot be doubted, we think, that a creditor having an unpaid debt against a decedent, not barred by the statute, is not precluded, by mere omission to present his claim pursuant to notice, from establishing his debt and demanding an accounting at any time before the executor or administrator is formally discharged from his trust. But where an executor or administrator proceeding in good faith, he being also residuary legatee, applies to his own use the assets remaining after having paid all the claims under the will and all claims presented in usual course pursuant to notice, he cannot, we think, be held accountable, except for the actual value of the assets which formed a part of the testator's estate, nor can he be charged with the profits of a business into which he puts the money or property of the testator or intestate. The inventory and appraisal are not conclusive of the extent or value of the assets, although *prima facie* evidence. (*Forbes v. Halsey*, 26 N. Y. 53.) The creditors on an accounting may show that articles were omitted or that they realized a larger sum than the appraised value. In the present case the articles connected with the ice business con-

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Statement of case.

tained in the inventory were of a nature capable of identification and separate valuation, and the burden was upon the contestant to surcharge the account. This burden was not met by showing that five years after the testator's death the administrators embraced in a single sale, which purported to be a sale by them as individuals, some of the property specified in the inventory and also property which never belonged to the estate, for a gross sum exceeding the inventory value of the articles of the estate included in the sale in the absence of any evidence of the consideration allowed for the former, or that its actual value exceeded the inventory value.

We think the decree of the surrogate was properly reversed by the General Term, and judgment absolute is, therefore, directed in favor of the respondents on the stipulation.

All concur.

Judgment accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
ANTHONY GIRARD, Appellant.

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145	105
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Adding a foreign and artificial ingredient to a food product, even for the purposes of color merely, is in effect an adulteration, and the legislature has the power absolutely to prohibit it.

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e 75 AD ³	20

The provision of the act, "to prevent deceptions in sales of vinegar" (§ 4, chap. 515, Laws of 1889), declaring that "no person shall manufacture, produce, sell or keep for sale any vinegar which shall contain any preparation * * * injurious to health, or any artificial coloring matter," is constitutional. The prohibition against "coloring matter" is for the prevention of fraud; as the coloring of vinegar can only be for the purposes of deception and to defraud the buyer.

Reported below, 73 Hun, 457.

(Argued January 29, 1895; decided February 26, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made November 21, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court.

SICKELS — VOL. C. 14

This action was brought to recover penalties under section 4 of chapter 515 of the Laws of 1889, known as the Vinegar Law.

The facts, so far as material, are stated in the opinion.

F. G. Fincke for appellant. The legislature cannot properly pass an act which is ostensibly to protect the public health or to prevent deception in the sale of an article, but which does not relate to the public health, or to the prevention of fraud, and thereby destroy the property or interfere with the rights of an individual. (*In re Jacobs*, 98 N. Y. 98, 108-110; *People v. Marx*, 99 id. 377-385; *People v. Arensburg*, 103 id. 388; 105 id. 123; *People v. Gillson*, 109 id. 389; *People v. Cipperly*, 37 Hun, 324; 101 N. Y. 634; *Bertholf v. O'Reilly*, 78 id. 515; *Wynhamer v. People*, 13 id. 378.) So much of section 4 of chapter 515 of the Laws of 1889 as absolutely prohibits the manufacture and sale of any vinegar which shall contain any artificial coloring matter is unconstitutional. (*People v. Dodo*, 63 Hun, 583; Laws of 1893, chaps. 332, 338.)

C. D. Adams and *Fred. C. Schraub* for respondent. Chapter 515 of the Laws of 1889 is valid. (*People v. Gillson*, 109 N. Y. 389; *People v. Cipperly*, 101 id. 634; *People v. Durston*, 119 id. 569; 103 id. 388; 105 id. 123; 106 id. 293, 321.)

FINCH, J. The argument in this case concedes the undoubted rule that the police power of the state may be exerted to protect the public health or prevent a fraud upon the people, but that the law professing to intend that result must indicate by its terms that such was its real and actual purpose, and exhibit a capacity to operate in the asserted direction. The defendant sold vinegar containing artificial coloring matter in violation of the law of 1889 (Chap. 515, § 4), which provides that "no person shall manufacture, produce, sell or keep for sale, or offer for sale, any vinegar which shall contain any preparation of lead, copper, sulphuric acid,

or other ingredients injurious to health, or any artificial coloring matter." It is evident that the last clause has relation to the prevention of fraud, not only because of the form and mode of expression, but also because, if limited to an effect upon the public health, it would become a mere useless repetition. Any ingredients so injurious had already been prohibited, and the further limitation must be assumed to have a further purpose and relate to the prevention of fraud in the production and sale of vinegar. It must be also assumed that the legislature acted with knowledge of this particular food product, of its appearance, and the modes of its manufacture. Everybody is familiar with cider vinegar, for it goes into all households. Its color and appearance are as well understood as its taste. But another vinegar has come upon the market made by a distillation from grain. It is said to be entirely healthy and safe as a food product, and that may be granted. No law forbids its manufacture or sale. The markets of the state are open to it freely, and without restraint, and the only prohibition is against the fraud of a false color. Its natural color when honestly made is much lighter than that of cider vinegar, and gives it rather a resemblance to water with some faint trace of color, or to a white wine. Purchasers had a natural preference for the old familiar article and were more or less averse to an experiment with the new. They could tell the difference at a glance by the marked difference in color. The new product probably made its way slowly for that reason, and the greed of profit, which has adulterated or disguised almost every article of food, led to the device of coloring it so as to change its appearance from almost white to a brown or amber color, which is that of the ordinary cider vinegar. Thus changed, the new product might easily deceive purchasers. They would accept it supposing it to be cider vinegar when, if its natural color had remained, they would have refused it. Obviously, the artificial coloring matter is used for some purpose. It adds to the cost and labor of preparation, and such expense would not be incurred unless it improved the salable quality of the article. The coloring

matter does not affect the taste or actual quality of the vinegar when, as here, it is burnt sugar or carmel which is used, but it does change the appearance. It masks the truth; it effects a disguise; it naturally deceives and is intended to deceive; for the new color is that of cider vinegar and enables the substituted product to be foisted upon those who prefer and see^t the old. We can see how it operated in the case before us. The defendants are Italians. They say they knew nothing about cider vinegar and that such an article is not found in Italy. They were good subjects for the manufacturer to use. They bought a barrel of vinegar and got the distilled product having an artificial amber color. A purchaser comes and asks for cider vinegar. The sellers give him the new, claiming that vinegar is vinegar, and very possibly not appreciating the word cider as a qualification. But whether they were the mere tools of the manufacturer or themselves cognizant of the situation, it is apparent that the vinegar was colored for purposes of deception and to defraud the buyer. The legislature had a right to forbid that device and put a stop to the fraud, but how were they to do so? They might forbid specially the use of a coloring matter creating a resemblance to cider vinegar, or accomplish the same purpose by forbidding the use of any coloring whatever. By the first process they would remit the question of imitation to a jury; by the second they would decide it themselves conclusively and once for all. So far as the present facts are concerned, either form of prohibition effects one and the same precise result, for there is no proof that distilled vinegar is ever colored or even likely to be colored in any other way than so as to resemble cider vinegar; and the form of the law, judged by the situation it was framed to meet, is identical in its results in either case. But beyond that, the legislature might make the prohibition absolute for two reasons: One, the difficulty of enforcing a special provision limited narrowly to an imitation with intent to deceive, in which event there would always be a question of fact more or less hampering the effective execution of the law: and the other, that any tamper-

ing with food products which adds ingredients not natural or essential is fraught with danger to the public health, or, at least, involves the intent and result of a fraud upon the community. Food should be pure, absolutely and unquestionably pure. No tricks should be played with it. The legislature may resolutely protect it. No artificial color can ever be added to distilled vinegar for any good or honest purpose that I can imagine. Counsel say it might be colored blue or green so that no purchaser would take it for cider vinegar, and yet the law is broad enough to forbid that. I grant it. The case is imaginary, but assume it to be real. The blue or green color would, at least, disguise the actual product, and permission to color at all opens the door to coloring matters which might well be dangerous to health. Must the legislature wait for the experiment and until some number of people are made sick or die of it? In so serious a matter as the absolute purity of food we ought not to say that a general law, which simply compels that absolute purity, is beyond the power of the legislature.

There is talk here of interference with the vested rights of the individual. Sometimes it is pertinent and weighty, but in this case it is neither. It becomes the assertion of a vested right to color a food product so as to conceal or disguise its true and natural appearance; in plain words, a vested right to deceive the public.

This is by no means the first time that the legislature has acted by a general law in seeking to protect the public health and safety. It has provided a fixed standard for the purity of milk, judging for itself, absolutely and conclusively, what that standard should be, instead of leaving it to the varying judgment of different juries. We sustained that law in the case of *Cipperly*, adopting as our own the dissenting opinion of Judge LEARNED at the General Term (37 Hun, 319; 101 N. Y. 634). There it was claimed that the law was too broad and inflexible; that instead of merely forbidding the sale of impure or unhealthy milk, it prohibited the sale of all below an arbitrary standard of purity; and so, that milk which was perfectly

pure and healthy might fall within the prohibition because below the standard. We sustained, nevertheless, the constitutionality of the act and the right of the legislature to judge for itself of the danger and the remedy. The right of the legislature to that effect was well illustrated in *Commonwealth v. Alger* (7 Cushing, 96), where the case of a powder mill or slaughter house endangering the safety or health of the people was used as an illustration. The legislature is not bound merely to enact that such a structure shall not be put so near to a city or village as to endanger the citizens, but may judge for itself and decide what is that distance and not leave it for a jury to say. A municipal corporation may in like manner fix authoritatively and by a general ordinance the rate of speed of railroad trains through its streets. These cases are referred to only as showing the right of the legislature to judge for itself of the character and extent of the danger which is shown to exist, and to apply the remedy by a definite rule of prohibition. Every general law may work harshly in a few particular instances. If that were true in the present case it would not determine the constitutional question. Adding a foreign and artificial ingredient to a food product, even for purposes of color merely, is, in effect, an adulteration, and whether it be so described or forbidden by more specific terms is not material. The present law does not in the least interfere with the honest manufacture and sale of the distilled vinegar. It simply provides that it shall not be falsely colored. I think the legislature did not in this case, and under the circumstances existing, exceed its power.

The judgment should be affirmed.

All concur, except BARTLETT and HAIGHT, JJ., dissenting, the latter on the construction of the statute.

Judgment affirmed.

JOHN F. MONTIGNANI, as Administrator with Will Annexed,
Appellant and Respondent, v. MARY Y. STAATS BLADE et al.,
Appellants and Respondents.

When in a testamentary gift of personal property the word "heirs" is used, this is to be taken to mean those in the line of distribution, *i. e.*, the next of kin, and where the will shows on its face that the person whose heirs are referred to was to the knowledge of the testator living at the time of the execution of the will, the word refers to those who would be the next of kin were the ancestor deceased.

The holographic will of S. contained a clause which, after a bequest to a son of the testator of certain shares of stock, proceeded as follows: "To be held in trust by my executors ten years from and after my decease, then to be delivered and transferred to them; if deceased, do and continue the same to his son William, now in his eighth year; if both are deceased before the ten years have expired, then transfer and deliver the said shares to my daughters." The clause then named two daughters and provided that if either was deceased her portion should be transferred to the survivor, and in case of the death of both, to a daughter-in-law named or her heirs. In an action to obtain a construction of the will, *held*, that there was no unlawful suspension of the power of alienation; that the suspension was not for an arbitrary and fixed period, nor was the trust so limited, but both inevitably terminated upon the expiration of the two named lives, and could only run for the ten years on condition that one or both of the selected lives continue so long.

By another clause of the will certain shares of stock were given to a daughter-in-law of the testator to be held "in trust seven years" from his death for the benefit of the daughter-in-law and her daughter, and then to be transferred and delivered to the latter. In case of the death of the grandchild before the expiration of the seven years, it was provided that "this bequest to her shall be given and transferred to her mother;" if both die, then "to the heirs" of a son of the testator. *Held*, that the trust was measured by two lives in being at its creation, and so was valid; that by the provision for the ultimate vesting of the stocks in the "heirs" of the testator's son, those who would be next of kin if he were dead were intended.

By another clause the testator gave to M., a daughter, a house and lot with the furniture therein "for her occupancy and use," the same (using the language of the will) "to be held in trust by my executors seven years from and after my decease," also certain shares of stock, the dividends to be collected and paid to the daughter. At the expiration of the seven years it was provided that "the foregoing bequests shall be transferred and delivered to" M. If M. should die before the expiration of the seven years it was provided that "these bequests shall be delivered

to or disposed of" as a daughter and a son of the testator named "shall request and direct," the proceeds to be paid to three persons named. *Held*, that the trust was valid, as it only ran for one life or the shorter period of seven years within that life; that although the testator described his disposition as "bequests" it covered the real as well as the personal property; that the provision giving some power or authority to the son and daughter could not be construed as a power of appointment or as conferring upon them any estate, but simply made them arbitrators in case of any disagreement between the three beneficiaries as to an actual division or a sale and division of the proceeds.

Another clause provided that "from the cash funds" belonging to the testator in a bank named, his funeral and burial expenses and other just claims against him should be paid, and the residue, if any, paid to M. The will was executed in November, 1889. In November, 1890, the testator borrowed \$300 from said bank giving his note therefor. In December thereafter he executed to the president and cashier of the bank a formal transfer of ten shares of stock, containing a power of sale which he sent to the transferees with a letter directing them to pay with the proceeds his indebtedness to the bank and pay the balance to M. In 1891 the testator paid the note, but left the stock in the hands of the bank, and soon thereafter procured another loan. At the testator's death there was about \$150 to his credit on the books of the bank. *Held*, that the words "cash funds" in the bank included only the balance on deposit to the credit of the testator at his death, and that the stock was transferred simply as collateral.

The second loan had not been paid, but the bank had not resorted to said collateral. M. was the testator's housekeeper, and he was in the habit of giving her money to pay household expenses. The trial court adjudged that an express trust was created in the stock for the benefit of M. *Held*, that this portion of the decision was invalid; that the action being simply for the construction of the will the court had no power to go outside of it, and construe an independent business agreement.

It seems, that no trust was created in the stock, nor was there a gift thereof to M.

Montignani v. Blade (74 Hun, 297), modified.

(Argued February 5, 1895; decided February 26, 1895.)

CROSS-APPEALS from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made December 14, 1893, which modified and affirmed as modified a judgment construing the will of Bernardus E. Staats, deceased, entered upon a decision of the court on trial at Special Term.

This action was brought for a construction of the will of Bernardus E. Staats, deceased. The provisions of the will in question are as follows :

"I hereby bequeath and give to my son, Bernardus E. Staats, all my shares of stock in Wells, Fargo & Company Express, to be held in trust by my executors ten years from and after my decease, then to be delivered and transferred to him, if deceased do and continue the same to his son William, now in his eighth year of age. The dividends shall be collected, when and as declared, by my executors until transferred and delivered and paid to my son, or, if deceased, to his son William; if both are deceased before the ten years have expired, then transfer and deliver the said shares to my daughters, Lydia Ann Staats, and Mary Yates Staats, each share and portion equal. If either daughter is deceased, her portion shall be transferred and delivered to the remaining daughter. If both are deceased, then this bequest shall be given to my daughter-in-law, wife of my son John H. Staats, or their heirs, and my daughter-in-law Harriet Staats, or her heirs, each share and portion equal.

"I bequeath and give to my daughter-in-law Harriet Staats, widow of my deceased son, William Staats, fifty shares of American Express Company stock, to be held in trust seven years from my decease, for my grandchild, her daughter, Bella T. Staats, then to be transferred and delivered to this daughter; the income, *i. e.*, dividends, shall be collected by and paid to either mother or daughter, for mutual support and benefit; if the said daughter is deceased before the expiration of the seven years, then this bequest to her shall be given and transferred to her mother; if both mother and daughter are deceased before the seven years have expired, then this bequest shall be transferred and delivered to the heirs of my son, John H. Staats.

"I hereby bequeath to my daughter, Mary Yates Staats, the house and lot No. 52 Elm street, now occupied by myself, also all the furniture and housekeeping articles and utensils therein, for her own occupancy and use, to be held in trust

by my executors seven years from and after my decease. I also bequeath to said daughter all my shares of stock in the New York Central and Hudson River Railroad Company; the dividends, when declared, shall be collected by my executors and paid to said daughter. At the expiration of the seven years the foregoing bequests shall be transferred and delivered to said Mary Yates Staats, as and when so requested by her and practicable. If this daughter is deceased before the expiration of the seven years these bequests shall be delivered to, or disposed of, as my daughter, Lydia Anna Staats, and my son, John H. Staats, shall request and direct; the proceeds shall be paid to my daughter, Lydia Anna Staats, and my daughter-in-law Willa F. C. Staats and my daughter-in-law Harriet Staats, each share and portion alike, as near as can be done and satisfactory to all concerned."

"From the cash funds belonging to myself in the First National Bank, Albany, pay funeral and burial expenses and other just claims against myself, the residue or balance, if any, pay to my daughter, Mary Yates Staats."

The further facts, so far as material, are stated in the opinion.

Eugene D. Flanigan for Harriet Staats and others, appellants and respondents. The trusts created in and by the second and third disposing clauses of said last will, being separate and distinct from every other portion of said last will, as well as being separate and distinct from each other, should be treated, each, as if it were the sole clause for review before this court. (3 Jarman on Wills, 709; Perry on Trusts [4th ed.], § 724; *Kane v. Gott*, 24 Wend. 646-666; *Parks v. Parks*, 9 Paige, 107-117; *DeKay v. Irving*, 5 Den. 646; *Long v. Kopke*, 5 Sandf. 363-371; *Van Vechten v. Van Vechten*, 8 Paige, 120; *Kennedy v. Hoy*, 105 N. Y. 134; *Culcross v. Gibbons*, 130 id. 447-452; *Underwood v. Curtis*, 127 id. 523; *Oxley v. Lane*, 35 id. 340; *Harrison v. Harrison*, 36 id. 543; *Schettler v. Smith*, 41 id. 328; *Knox v. Jones*, 47 id. 389-395.) In both the second and third disposing clauses

of said last will, the testator disposed simply of personalty, and the trusts created in and by both the second and third disposing clauses were of personalty. Such trusts have never been hampered by the limitations which the statute attaches to real property, except as to the suspensive power of the absolute ownership, beyond two lives in being at the time of the creation of the trusts. No particular form of words is necessary to create such trusts. The statute is satisfied where there is no suspension beyond two lives in being. (Perry on Trusts [4th ed.], § 86; *Day v. Roth*, 18 N. Y. 448; *Gilman v. McArdle*, 99 id. 451; *Martin v. Funk*, 75 id. 134; *Young v. Young*, 80 id. 422; *Horner v. Sidway*, 124 id. 539-550; *In re Carpenter*, 131 id. 86; *Cochran v. Schell*, 140 id. 516; *Tilden v. Greene*, 130 id. 29; *Gilman v. Reddington*, 24 id. 9; 3 R. S. 2179, § 40; *Savage v. Burnham*, 17 N. Y. 561; *Phelps v. Pond*, 23 id. 69; *Schermerhorn v. Cotting*, 131 id. 48-61; *Williams v. Williams*, 8 id. 538.) The trusts created in and by the second and third disposing clause of said last will and testament, are legal, valid and subsisting trusts, even though for a term of years, because each is dependent on not more than two lives in being at the time of the creation of the trust, and the death of the *cestuis que trust* at any time before the expiration of the fixed period for vesting in them, terminates the trust, and vests the remaindermen with the absolute ownership of the *corpus* of the trust. (*Crook v. County of Kings*, 97 N. Y. 421; *Bailey v. Bailey*, Id. 460; *Bind v. Pickford*, 141 id. 18; *Gilmore v. Ham*, 142 id. 1; *Gilman v. Reddington*, 24 id. 9; *Schermerhorn v. Cotting*, 131 id. 48-50; *Phelps v. Pond*, 23 id. 69.) In construing these second and third clauses of this will, it is the duty of the court to construe all parts of each together, so as to make a lawful and consistent whole. And if one sentence is ambiguous, and a sentence in another part of the clause is capable of explaining and making clear and lawful what testator meant to express in the first sentence, then it is the duty of the court to construe the first sentence, by aid of the light which may be shed upon it by the succeeding sentence. (*Bird v.*

Pickford, 141 N. Y. 18; *In re N. Y., L. & W. R. Co.*, 105 id. 92; *Stokes v. Wiston*, 142 id. 433; *Miller v. Gilbert*, 144 id. 68-74; *Emery v. Sheldon*, 68 id. 256; *Burnon v. Burnon*, 55 id. 351; *Lamb v. Lamb*, 131 id. 237; *Thomas v. Snyder*, 43 Hun, 14; *Lytle v. Beverage*, 58 id. 592.) The law of perpetuity is not transgressed in the third disposing clause. (*Rose v. Hatch*, 125 N. Y. 427; *Bundy v. Bundy*, 38 id. 410-418; *Green v. Green*, 125 id. 507; *Smith v. Van Ostrand*, 64 id. 278.) It is the duty of the plaintiff herein to transfer and deliver the fifty shares American Express Company stock to Harriet immediately. (*Wager v. Wager*, 96 N. Y. 164; *Cross v. U. S. T. Co.*, 131 id. 330; *Woodward v. James*, 115 id. 346.) Even though the ulterior limitations over are void, such voidness cannot affect either of the trusts created in the second and third disposing clauses, if otherwise valid, and the legal title to the respective funds disposed of in the second and third clauses remains in the trustees, subject to the execution of trust. (*Hillen v. Iselin*, 144 N. Y. 365; *Lewin on Trusts*, 249; *Fletcher on Trustees*, 48; *Powell on Devises*, 221, note 7; *Brewster v. Striker*, 2 N. Y. 33; *Irving v. McCay*, 9 Paige, 33; *Hawley v. James*, 5 id. 481; *Goynton v. Hoyt*, 1 Den. 53; *Van Vechten v. Van Vechten*, 8 Paige, 128; *Huxton v. Corse*, 2 Barb. Ch. 92; *Williams v. Williams*, 8 N. Y. 538; *Kilpatrick v. Johnson*, 15 id. 324; *Phelps v. Pond*, 23 id. 80, 82; *Gilman v. Reddington*, 24 id. 19; *Levy v. Hart*, 54 Barb. 262; *Manice v. Manice*, 43 N. Y. 303; *Green v. Green*, 125 id. 506-510.) The renunciation of the executor and trustee, under the last will, of the offices of both executor and trustee, and the appointment of plaintiff as administrator with the will annexed, does not invest plaintiff with the powers of trustee. Such trustee must be appointed by the court. (*Kirk v. Kirk*, 137 N. Y. 510; *Cook v. Platt*, 98 id. 39; *Lahey v. Cortright*, 132 id. 450; *Walter v. Carpenter*, 137 id. 86.)

George H. Stevens for Mary Y. Blade, appellant and respondent. This is an autographic will, inartificially drawn,

regardless of or in ignorance of technical rules, or of the artificial and technical meaning of terms. Such construction should be given as is required by the terms and general scope of the will, and the manifested and express intent of the testator. (*Lytle v. Beveridge*, 58 N. Y. 592; *Post v. Hoover*, 33 id. 593; *Stokes v. Weston*, 142 id. 433.) The intent of the testator was that his daughter Mary, for seven years after his death, should have the benefit and income of the real estate 52 Elm street, Albany, N. Y., and his New York Central stock; if this daughter was living at the expiration of the seven years she was to take said real estate and stock absolutely; if the daughter Mary should die within the seven years, then immediately upon her death within the period named the real estate and stock was to be disposed of and the proceeds thereof divided equally between his daughter Lydia Anna Staats and his daughters-in-law Harriet Staats and Willa F. C. Staats. (*Greene v. Greene*, 125 N. Y. 512; *Roe v. Vingut*, 117 id. 204.) The provisions for the benefit of the daughter Mary, contained in the fourth disposing clause of the will, are not in contravention of the statutes against perpetuities and the unlawful accumulation of personal property. (*Bolles on Susp. Power Alien.* 62, § 87; *Schermerhorn v. Cotting*, 131 N. Y. 48; *Oxley v. Lane*, 35 id. 345, 346; *Matteson v. Matteson*, 51 How. Pr. 276; *Buchanan v. Tebbetts*, 69 Hun, 81; 1 R. S. 723, § 14; *Beardsley v. Hotchkiss*, 96 N. Y. 215; *Gott v. Cook*, 7 Paige Ch. 521; *Bradley v. Hotchkiss*, 96 N. Y. 215.) The testator's provisions for his daughter Mary Yates Staats (now Mary Y. S. Blade), contained in the fourth disposing clause of the will, are valid. (*Harrison v. Harrison*, 36 N. Y. 547, 548; *In re Williams*, 64 Hun, 163; *Roe v. Vingut*, 117 N. Y. 204; *Henderson v. Henderson*, 113 id. 15; *Moore v. Moore*, 47 Barb. 257; *Blanchard v. Blanchard*, 4 Hun, 287; 8 N. Y. 615; *Oxley v. Lane*, 35 id. 345, 346; *Bowditch v. Ayrault*, 138 id. 222; 4 Kent's Com. 9; *Mayor, etc., v. Stuyvesant*, 17 N. Y. 34, 39, 41; *Leonard v. Burr*, 18 id. 96; *Warner v. Durant*, 76 id. 133; *Smith v. Smith*, 141 id. 29.) The tes-

tator, by delivering the stock with power to sell same and letter as to proceeds, created a trust of the Central National Bank stock for the benefit of his daughter Mary, subject to the payment of his indebtedness to the First National Bank of Albany. (*Gilman v. McArdle*, 99 N. Y. 451; *Martin v. Funk*, 75 id. 134; *Stone v. Hackett*, 12 Gray, 230; *Millard v. Clark*, 80 Hun, 141; *Goven v. de Miranda*, 140 N. Y. 474.) The defendant, Mary Y. Staats Blade, is entitled to such relief in this action as her rights under the will entitled her to, even though she may have demanded too much in her prayer for judgment herein, or if the relief asked by her may be erroneous. (*Frear v. Pugsley*, 9 Misc. Rep. 316.) If the court should find that a valid trust of either the realty or personalty devised or given to the daughter Mary has been created, the powers and rights conferred on the executors in the will do not pass to the plaintiff as administrator with the will annexed. (Redf. Surr. Pr. [4th ed.] 375.)

Isaac H. Maynard and *Robert G. Scherer* for Willa F. C. Staats, appellant and respondent. The provision in what is termed the third paragraph of the will is void, because it unlawfully suspends the absolute ownership of the personal property therein attempted to be bequeathed. (*Emmons v. Cairns*, 3 Barb. 243; *Mills v. Husson*, 104 N. Y. —; *Cook v. Lowry*, 95 id. 103; *Delafeld v. Shipman*, 103 id. 463; *Graff v. Bennett*, 31 id. 13; *Williams v. Thorn*, 70 id. 270; *Cutting v. Cutting*, 86 id. 544; *In re Russell*, 5 Den. 388; *Hawley v. James*, 16 Wend. 61; *Shettler v. Smith*, 41 N. Y. 328; *Knox v. Knox*, 47 id. 389; *Shipman v. Rollins*, 98 id. 311; *Cross v. U. S. Trust Co.*, 131 id. 330; *Underwood v. Curtis*, 127 id. 523; *Rice v. Barrett*, 102 id. 161; *Robert v. Corning*, 89 id. 235.) The trial court erred in holding that the testator intended to and did create an express trust of the Central National Bank stock for the benefit of his daughter Mary Y. Staats, and constituted Van Allen and Rowell trustees thereof. (*Butler v. Dupont*, 19 J. & S. 77; *Young v. Young*, 80 N. Y. 438; *Curry v. Powers*, 70 id. 212; *Jack-*

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Opinion of the Court, per FINCH, J.

son v. T. T. S. R. R. Co., 88 id. 520; *Neufville v. Thompson*, 3 Edw. Ch. 92; *In re Crawford*, 113 N. Y. 560.)

George H. Mallory for plaintiff, respondent and appellant. Testator created no trust in favor of Mrs. Blade. (*Holland v. Alcock*, 108 N. Y. 317; *Chace v. Perkins*, 130 Mass. 128; *Perkins v. Perkins*, 134 id. 441; *Long v. Palmer*, 118 U. S. 321; *R. L. Works v. Kilby*, 88 N. Y. 229; *Young v. Young*, Id. 488.) It is decisive that there is no claim made, nor can be, that Mrs. Blade, the alleged beneficiary of this imaginary trust, was ever informed of her name being used in connection with this loan or the stock or any disposition of the proceeds thereof. She received none of the dividends, although such were declared and paid between November, 1890, and June, 1891. She was unaware of the loan, of the power of attorney and of the letter, and so cannot claim as donee. (*Orr v. McGregor*, 43 Hun, 528; *Beaver v. Beaver*, 117 N. Y. 421.) There was no such delivery of the Central Bank stock to Mrs. Blade, or to any person for her, as sufficed to divest the possession and title of Mrs. Staats, or effectuate a gift. (*Young v. Young*, 80 N. Y. 423; *Curry v. Powers*, 70 id. 212; *Meigs v. Meigs*, 15 Hun, 453; *In re Crawford*, 113 N. Y. 560.) As Mrs. Blade had not taken the subject-matter of the alleged trust into her possession, the alleged donor, Staats, had a right to resume possession, revoking the gift. This revocation is clearly shown by several acts, principally by Staats collecting the interest coupons and by his paying the secured note from his other funds. (*Whiting v. Barrett*, 7 Lans. 106.) The claim that this stock is contemplated in that clause under the term "cash funds belonging to myself in the First National Bank" is untenable. (*Bumpus v. Bumpus*, 79 Hun, 526; *Stimson v. Vroman*, 99 N. Y. 79.)

FINCH, J. This action is brought to settle the construction of the last will of Bernardus E. Staats, deceased. The validity of the first disposing clause, which gives to his daughter Lydia Ann his stock in the Fourth National Bank of New York, is

not disputed or open to any doubt. But several of the bequests following have been declared invalid.

The testator's second bequest is to his son Bernardus, and consists of Wells, Fargo & Co. Express stock, but with the following limitation, viz.: "To be held in trust by my executors ten years from and after my decease, then to be delivered and transferred to him ; if deceased, do and continue the same to his son William, now in his eighth year of age. The dividends shall be collected when and as declared by my executors until transferred and delivered and paid to my son, or, if deceased, to his son William ; if both are deceased before the ten years have expired, then transfer and deliver the said shares to my daughters Lydia Ann Staats and Mary Yates Staats, each share and portion equal. If either daughter is deceased, her portion shall be transferred and delivered to the remaining daughter. If both are deceased, then this bequest shall be given to my daughter-in-law, wife of my son John H. Staats, or their heirs, and my daughter-in-law Harriet Staats or her heirs, each share and portion equal." The testator drew his own will, and this disposition is, in some respects, awkwardly expressed, and yet is not of doubtful meaning. The Special Term pronounced the bequest invalid upon the ground that a trust for ten years was created which suspended the absolute ownership of the stock for a longer period than two lives in being. The General Term reversed that conclusion and adjudged the disposition to be valid and effectual. The appellate tribunal was clearly right. The suspension was not for an arbitrary or fixed period, nor was the trust so limited. Both were bounded by the two lives of Bernardus, the son, and William, the grandson. Explicitly and in terms it is declared that, if both die within ten years, then the stock is to vest at once in certain named persons. The trust in such event necessarily ends, although the ten years have not expired, and is inevitably terminated by the expiration of the two named lives, both in being when the will took effect. In substance, the trust is for two lives or a shorter period, and cannot, in any event, exceed their duration. It

can run for ten years only on condition that one or both of the selected lives continue so long. If they do, the trust ends and the gift vests during such lives, but at the end of the fixed period; if they do not, the vesting at once occurs, although the fixed period has not expired. There is, therefore, no undue suspension of the absolute ownership of the stock as a consequence of the trust created, and the General Term correctly decided that the bequest was valid and effectual. (*Schermerhorn v. Cotting*, 131 N. Y. 48.) The dividends declared upon the stock are to be collected by the administrator and paid over when collected to the beneficiaries, as directed; to the son Bernardus, if living, and, if not, to the grandson William; such payments to continue during the running of the trust. If at the end of ten years Bernardus is living the stock becomes his; if he is dead at that date, but the grandson is living, the stock will be his; if both be dead at that date or earlier, it will go absolutely to the remaindermen. The interests of Lydia and Mary appear to be contingent upon their survival respectively at the period which shall end the trust. If at that date the one be dead the remainder goes to the other; if both are dead it goes over to the daughters-in-law and their heirs respectively, and in equal shares.

The third disposition of the will was pronounced void by the General Term for reasons which we are unable to appreciate. Its form is almost exactly like that of the previous bequest which was held valid, and differs only in the fact that the fixed period is seven years instead of ten. It creates a trust for the benefit of the daughter-in-law, Harriet, and her daughter Bella, and provides that for seven years the income shall be paid to them for mutual support and benefit, but if Bella lives to the end of the seven years the stock goes to her; if she dies before that period it goes to Harriet; but if both be dead before the expiration of the seven years then it vests at once and absolutely in the heirs of the testator's son John. Here, again, there is no trust which must continue seven years, but one measured by the two lives of Harriet and Bella, at the

end of which it will inevitably vest, but may vest earlier and within those lives by force of the fixed period which terminates the trust, although the selected lives continue. The same considerations which induced the General Term to hold valid the prior bequest should have operated to preserve this one which is equally valid and effectual. It is true that the testator in providing for the ultimate vesting gave the stock to the "heirs" of his son John, and since John is living and strictly can have no heirs until his death, it is argued that the vesting is postponed for the further life of John. But where the bequest is of personal property the word heirs is taken to mean those in the line of distribution, or the next of kin; and where the will shows on its face that the person whose heirs are referred to is, to the knowledge of the testator, at that time living, it is obvious that it is not used in its strict technical sense, but means in the case of land, heirs apparent, or those who would be the heirs were the living ancestor deceased, (*Heard v. Horton*, 1 Den. 168), and, in the case of personal property, next of kin, who would be such were the ancestor deceased, (*Cushman v. Horton*, 59 N. Y. 151.) In this will the son John is twice spoken of as living, and once in a connection which implies his active interference, and, since the intent to vest the remainder absolutely is manifest, we must take the word "heirs," as used by this unskilled testator drawing his own will, to mean those who, if John were dead, would be his heirs or next of kin. There is thus no difficulty in holding that the absolute ownership was not postponed beyond the required two lives.

The fourth disposition of the will was deemed invalid as creating an unlawful suspension both by the Special and General Term. With one exception it is framed in the same general manner as the two which immediately precede it. It disposes of the house and lot on Elm street and the furniture therein, and also of testator's New York Central stock, and puts them in trust for seven years, provided the single life of his daughter Mary shall continue so long. The trust, therefore, runs for one life or the shorter period of seven years

within that life. If Mary lives beyond that term the house and lot and stock become hers, but it is explicitly provided that if she dies before the expiration of the seven years the property shall vest in the daughter Lydia, and the two daughters-in-law Willa and Harriet. Although the testator describes his disposition as bequests it evidently covered the real as well as the personal property. During the running of the trust up to its termination at the end of seven years, or its earlier termination by the death of Mary, she is to have the use and occupation of the house and lot, and the dividends on the stock. If she survives the seven years both become hers absolutely, but if she dies before that period the trust does not continue, but ends at once, and the remainder takes effect. I think that is so notwithstanding an interjected clause, not appearing in the previous dispositions and peculiar to this one alone. The whole limitation of the remainder is in these words: "If this daughter is deceased before the expiration of the seven years these bequests shall be delivered to or disposed of as my daughter Lydia Anna Staats and my son John H. Staats shall request and direct; the proceeds shall be paid to my daughter Lydia Anna Staats, and my daughter-in-law Willa F. C. Staats, and my daughter-in-law Harriet Staats, each share and portion alike as near as can be done, and satisfactory to all concerned." Obviously the interjected clause which gives some power or authority to the daughter Lydia and the son John cannot be construed as a power of appointment or as conferring upon them any estate, for that would be repugnant to the disposition which the testator himself proceeds to make of the entire estate in remainder to the three persons named. His use of the word "proceeds" and the situation of the property indicate his real meaning. He foresaw that the house and lot, the furniture and belongings, and the Central stock might not be easy of division into the contemplated thirds. The devisees might disagree as to the value of the land or the terms on which it should be sold, or the division of the Central stock, and as to whether there should be an actual division or a sale and division of proceeds. The

testator desired, without affecting his devise and bequest in remainder, which he proceeds at once to make, to put the necessary division under the advice and direction of Lydia and John, making them arbiters of the differences which might arise, and that is the sole effect of the interjected phrase. Their preference as to the manner of division, if not unfair to the rights devised and bequeathed, should guide the conclusions of the parties or of the court in the event of disagreement, but their choice will not be conclusive since it is plainly subordinate to an actual and just division between the three, and is a provision intended merely to aid and assist in reaching that ultimate result and not at all to mar or defeat it. The suggestion is in line with many other similar expressions in the will adding the "request" of legatees to the fact and time of payment, and ordering the division into thirds "satisfactory to all concerned." The testator desired peace to follow his death and not war, and sought to reach it. There is no just reason for destroying this fourth disposition, and we hold it to be valid and effectual.

The fifth disposition of the will makes Willa F. C. Staats residuary devisee and legatee, and is followed by a clause which the General Term has construed in a manner which we approve, but accompanied with a further decision which we do not approve. It reads thus: "From the cash funds belonging to myself in the First National Bank Albany pay funeral and burial expenses and other just claims against myself; the residue or balance, if any, pay to my daughter Mary Yates Staats." The extrinsic facts proved were that on the 25th day of November, 1890, the testator borrowed three hundred dollars from the First National Bank of Albany and gave his note therefor. On the 8th of December following he executed, in the usual manner, a formal transfer to Van Allen, the president, and Rowell, the cashier of the loaning bank, of ten shares of the capital stock of the Central National Bank of New York city, and containing the ordinary power of sale. He sent that by mail to the transferees, accompanied by a letter stating the transfer and adding: "With the

proceeds pay my indebtedness to the First National Bank Albany, N. Y., and the balance to pay my daughter, Mrs. Mary Yates Blade, wife of Wm. Blade, Jr." The transfer was plainly intended as collateral to secure the bank for its loan. Early in 1891 he paid up the note, leaving the collateral in the hands of the bank, and soon thereafter borrowed again, presumably upon the security of the same collateral. The last loan has not been paid, but the bank has not sold the stock or resorted to its collateral to enforce payment. Mrs. Blade was testator's housekeeper, and he was in the habit of giving her money to enable her to meet the current household expenses. There was, at the date of his death, a cash balance of about one hundred and thirty dollars standing to his credit on the books of the bank. The will was executed in November of 1889, and before the transfer of this collateral. On this state of facts the Special Term adjudged that an express trust was created for Mrs. Blade covering the stocks transferred as collateral, and which constituted Van Allen and Rowell trustees of such trust property. The trial court also adjudged that the "cash funds belonging to testator in the First National Bank, Albany, were only the sum of \$130.84 there on deposit to his credit." This last was a perfectly correct conclusion, and within the scope of the action, because determining the construction of the phrase "cash funds," as used in the will. But beyond that the court had no right to go. The action was for the construction of the will, and gave no power to travel outside of it and pass upon the construction of an independent business agreement, and that, too, without bringing in the bank, which may have rights against the stock, or the individuals who are burdened with the trust. That part of the judgment impressing a trust upon the stock should, therefore, be reversed; but in view of the situation of the parties, and in the hope of averting needless litigation, we deem it proper to add that, in our opinion, no trust whatever was created in the stock transferred as collateral; that Van Allen and Rowell were not made, and did not become, trustees of an express trust, and that the claim of

Mrs. Blade cannot be sustained upon that ground, nor as a gift, because unexecuted. (*Young v. Young*, 80 N. Y. 438.)

It follows, therefore, that all of the dispositions of the will are valid and effectual, that the judgment of the General Term so far as it destroys any of them, and so far as it affirms the judgment of the Special Term impressing a trust upon the stock held as collateral be reversed and judgment be entered in accordance with the conclusions of this opinion, the costs of all parties to be paid out of the estate. The form of the judgment to be entered, in case of disagreement, may be settled before the judge writing the opinion.

All concur.

Judgment accordingly.

CHARLES E. HOVEY, as Survivor, etc., Appellant, v. GEORGE ELLIOTT et al., as Executors, etc., et al., Respondents.

The provision of the United States Revised Statutes (§ 725), providing that the United States courts shall have power to punish "by fine or imprisonment, at the discretion of the court, contempt of their authority," limits the power to the modes of punishment specified and operates as a negation of any other method.

The said provision applies to the Supreme Court of the District of Columbia.

The said court having been created by act of congress, not by the Constitution, congress may restrict and limit the exercise of its power in the respect specified, and this although it may have given it general jurisdiction in law and equity.

The said provision applies to civil as well as to criminal contempts.

Plaintiff's firm filed a bill in said court to enforce an alleged lien upon an award. R., a member of the firm of R. & Co., bankers, was appointed receiver, and a portion of the award, sufficient to meet plaintiff's claim, was paid over to him. Pursuant to the directions of the court, the receiver invested the fund in certain bonds. The defendants demurred to plaintiff's bill, the demurrer was sustained and a decree entered dismissing the bill and directing the receiver to pay over the funds in his hands to the defendants. R. thereupon delivered the bonds to defendants, who on the same day sold them for full value to R. & Co. The decree was reversed on appeal, an answer was interposed, and pending the trial of the issues defendants were adjudged in contempt for disobedience of an order of the court, their answer ordered to be stricken

out, and thereupon a judgment *pro confesso* was entered adjudging that plaintiffs had a lien upon the bonds. In an action based on said judgment, brought against R. & Co. to enforce the lien, it did not appear that they had any notice of the contempt proceedings. *Held*, that the court had no jurisdiction to strike out the answer; that said judgment was void as against R. & Co.; that as purchasers *pendente lite* they took the risk of the litigation then pending, but did not assume the risk of any punishment inflicted on the defendants therein in an independent proceeding; and so, that the complaint herein was properly dismissed.

(Argued January 31, 1895; decided February 26, 1895.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made October 27, 1892, which affirmed a judgment in favor of defendants entered upon the report of a referee dismissing the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Herbert B. Titus for appellant. If the decree in *Hovey v. McDonald* was assailable for the reasons stated by the referee, the remedy of the defendants was by direct review in the Supreme Court of the United States. Having failed to pursue that remedy, they and their privies are now estopped from collateral attack upon the decree. (*Dowell v. Applegate*, 152 U. S. 327; *Pepke v. Cronin*, 155 id. 100; *New York v. Eno*, Id. 89; *In re Fonda*, 117 id. 516; *Cooper v. Reynolds*, 10 Wall. 308; *D. M. A. Co. v. I. H. Co.*, 123 U. S. 559; *Gray v. Brignardello*, 1 Wall. 634; *Comstock v. Crawford*, 3 id. 404; *Thompson v. Tolmie*, 2 Pet. 163; *Ex parte Watkins*, 3 id. 193-207; *McCormack v. Sullivan*, 10 Wheat. 192-199; *Cornett v. Williams*, 20 Wall. 226; *Kempe v. Kennedy*, 5 Cranch, 173-185; *Skillen v. May*, 6 id. 267; *Nogue v. Clapp*, 101 U. S. 551; *Huling v. K. V. R. R. Co.*, 130 id. 559; *Graham v. B. R. R. Co.*, 118 id. 161; *Ex parte Bigelow*, 113 id. 325.) The Supreme Court of the District of Columbia made the regularity of its procedure in rendering this decree the subject of judicial determination; it could be questioned, therefore, only in that court, or by

appeal. (*Ex parte Bigelow*, 113 U. S. 331; *Black on Judg.* § 274; *Cooper v. Reynolds*, 10 Wall. 308; *Voorhees v. Bank*, 10 Pet. 439; *S. L. R. R. Co. v. McBride*, 141 U. S. 130; *Bryan v. Kennett*, 113 id. 180; *Holdans v. Sumner*, 15 Wall. 608.) If the Supreme Court of the District of Columbia exceeded its authority in ordering the answer of McDonald and White to be removed from the files, that does not affect the validity of the final decree. (*Comstock v. Crawford*, 3 Wall. 404; *Huling v. K. V. R. R. Co.*, 130 U. S. 559; *Mellen v. M. I. Works*, 131 id. 370; *Ex parte Bigelow*, 113 id. 328; *Thompson v. Tolmie*, 2 Pet. 168; *Ex parte Watkins*, 3 id. 173; *Voorhees v. U. S. Bank*, 10 id. 472; *Grignon v. Astar*, 2 How. Pr. 335; *Florentine v. Barton*, 2 Wall. 215; *Harvey v. Tyler*, Id. 346; *Cooper v. Reynolds*, 10 id. 308; *Cornett v. Williams*, 20 id. 249; *Maxwell v. Stewart*, 21 id. 73; *S. L. R. R. Co. v. McBride*, 141 U. S. 130; *Scofield v. Churchill*, 72 N. Y. 565; *Windsor v. Mc Veigh*, 93 U. S. 274; *Walker v. Walker*, 82 N. Y. 261.) The order of the Supreme Court of the District of Columbia, removing the answer of the defendants for their contempt, was within the power of the court, and was valid. (*Thompson v. Wooster*, 114 U. S. 100, 104; *Hornbuckle v. Coombs*, 18 Wall. 654; *Clinton v. Englebrecht*, 13 id. 447; *McAllister v. U. S.*, 141 U. S. 174; *Hovey v. McDonald*, 109 id. 150; *Fuller v. Clafin*, 93 id. 114.) The validity of the final decree of the Supreme Court of the District of Columbia in *Hovey v. McDonald* has been sustained by the Supreme Court of the United States. (*Hovey v. McDonald*, 109 U. S. 150; *R. Co. v. Swan*, 111 id. 382.) Plaintiff is entitled to final judgment on this appeal. (*Riker v. Leo*, 115 N. Y. 104; *Riggs v. Palmer*, Id. 514; *Wood v. Baker*, 60 Hun, 354; *Dammert v. Osborn*, 140 N. Y. 30.)

Everett P. Wheeler for appellant. The principal ground of the contention for the respondents is that section 725 of the United States Revised Statutes applies to the Supreme Court of the District of Columbia, and that its effect is to absolutely

divest that court of the power to strike out an answer of a defendant because of his disobedience to a previous order of the court. This is untenable. (*Kendall v. U. S.*, 12 Pet. 524; *U. S. v. Schurz*, 102 U. S. 378; *Clinton v. Englebrecht*, 13 Wall. 434.) The decree in the District of Columbia is not based on contempt proceedings. (*Walker v. Walker*, 82 N. Y. 260; *Brinkley v. Brinkley*, 47 id. 40; *Barker v. Barker*, 15 How. Pr. 568; *Farnham v. Farnham*, 9 id. 231; *Quigley v. Quigley*, 45 Hun, 23.) The fifth amendment to the Constitution of the United States provides that no person shall be deprived of his "property without due process of law." This means process adapted to the character of the case. It does not mean that the practice in common-law cases shall be the constitutional right of a defendant who is sued in a court of admiralty or of equity. (*Walker v. Walker*, 82 N. Y. 260; *Simmons v. Saul*, 138 U. S. 439, 452; *Noble v. U. R. L. R. R. Co.*, 147 id. 165, 174; *Thaw v. Ritchie*, 136 id. 519, 448; *Grignon v. Astor*, 2 How. Pr. 319; *Thompson v. Wooster*, 114 U. S. 104; *Walker v. Walker*, 82 N. Y. 260; 20 Hun, 400; *Pitt v. Davison*, 37 N. Y. 235; *El. L. Co. v. Superior Court*, 111 U. S. 410.) The judgment in *Hovey v. McDonald* is conclusive even if erroneous or irregular. (*O. Co. v. Compania Espanola*, 134 N. Y. 46; *Rocco v. Hackett*, 2 Bosw. 579; *Wineman v. Gastrell*, 53 Fed. Rep. 697, 703; *Bigelow v. Chatterton*, 51 id. 614, 620; *C. Bank v. Bank of Santa Fe*, 32 Pac. Rep. 627; *City of Paterson v. Baker*, 26 Atl. Rep. 324; *F. N. Bank v. Genesee*, 32 Pac. Rep. 902; *State v. Morris*, 2 N. E. Rep. 355; *Board of Guardians v. Shuter*, 34 id. 665; *Gates v. Preston*, 41 N. Y. 113; *Nemetty v. Naylor*, 100 id. 562; *Kinnier v. Kinnier*, 45 id. 535; *Ferris v. Fisher*, 67 Hun, 135; *Austin v. Austin*, 43 Ill. App. 488; *Gibbs v. Southern*, 22 S. W. Rep. 713; *Tracey v. Shumate*, 22 W. Va. 475; *Kent v. L. S. Co.*, 144 U. S. 75; *Dowell v. Applegate*, 152 id. 327.) The decision in this case made by the Second Division (118 N. Y. 124) controls the decision of the present appeal. (*Cluff v.*

Day, 141 N. Y. 580; *W. S. Bank v. Town of Solon*, 136 id. 465, 477; *Joslin v. Cowee*, 56 id. 626; *G. P. Co. v. Mayor, etc.*, 108 id. 278.) Defendants are bound by the judgment in District of Columbia, because purchasers *pendente lite*. (*Hovey v. Elliott*, 118 N. Y. 124; *Hovey v. McDonald*, 109 U. S. 150; *Tilton v. Cofield*, 93 id. 168; *Wright v. Tebbetts*, 91 id. 252.) The bonds are not negotiable. (*M. Bank v. N. Y. & N. H. R. R. Co.*, 13 N. Y. 599.) There was actual notice to Riggs & Co. Notice to one of several partners is notice to them all. (*Weetjen v. S. P. & P. R. R. Co.*, 4 Hun, 529; *S. Co. v. Hill*, 112 U. S. 185; *Lytle v. Lansing*, 147 id. 59.) The lien follows the proceeds of the bonds. (*Hovey v. Elliott*, 118 N. Y. 124; *V. S. Y. Bank v. Gillespie*, 137 U. S. 411; *N. Bank v. Ins. Co.*, 104 id. 54, 68; *I. & T. Bank v. Peters*, 123 N. Y. 272; *Holden v. N. Y. & E. Bank*, 72 id. 286, 296; *Deobold v. Offermann*, 111 id. 531; *Moore v. Williams*, 62 Hun, 55.) Plaintiffs are not entitled to final judgment. (Code Civ. Pro. §§ 994, 998, 1317; *Born v. Schrenkeisen*, 110 N. Y. 55, 60; *Jackson v. Andrews*, 59 id. 244; *Stoddard v. Whiting*, 46 id. 627; *Wood v. Baker*, 60 Hun, 337; *Moore v. Williams*, 62 id. 55.)

John Selden and *William G. Choate* for respondents. The plaintiffs wholly failed to make proof of the existence of their lien on the bonds purchased by Riggs & Co. of McDonald and White. The only evidence offered of the existence of the lien was the alleged decree of the Supreme Court of the District of Columbia, entered on the 17th day of April, 1878. That decree was absolutely void and a nullity. (*Kendall v. U. S.*, 12 Pet. 524; *Ex parte Bradley*, 7 Wall. 364; *U. S. v. Schurz*, 102 U. S. 378; *Page v. Burnstine*, 102 id. 664; *The City of Panama*, 101 id. 560; *McAllister v. U. S.*, 141 id. 184; *Embry v. Palmer*, 107 id. 3; *Anderson v. Dunn*, 6 Wheat. 227; *Ex parte Robinson*, 19 Wall. 505; *I. C. Co. v. Brimson*, 154 U. S. 489; *Fuller v. Claflin*, 93 id. 16; *McVeigh v. U. S.*, 11 Wall. 267; *Fanshaw v. Tracy*, 4 Biss. 498; *Gross v. Clark*, 87 N. Y. 272; *Brinkley v. Brinkley*,

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47 id. 50; *Williams v. Barry*, 8 How. [U. S.] 542; *Bigelow v. Forrest*, 9 Wall. 351; *In re Frederick*, 149 U. S. 76; *In re Bonner*, 151 id. 242; *Ex parte Reed*, 100 id. 23; *In re Mills*, 135 id. 270; *Elliott v. Peirsoll*, 1 Pet. 340, 341; *Hickey v. Stewart*, 3 How. [U. S.] 762; *Williams v. Berry*, 8 id. 540, 543; *Thompson v. Whitman*, 18 Wall. 467, 468; *Kilbourn v. Thompson*, 103 U. S. 168, 198; *Ex parte Lange*, 18 Wall. 176; *U. S. v. Walker*, 109 U. S. 267; *In re Nielsen*, 131 id. 182, 183, 184; *Griffith v. Frazier*, 8 Cr. 23, 26; *Johnson v. Pinney*, 1 Paige, 646; *Rogers v. Patterson*, 4 id. 455; *Ellingwood v. Stevenson*, 4 Sandf. Ch. 368; *Krom v. Hogan*, 4 How. Pr. 226; *Field v. Chapman*, 13 Abb. Pr. 330; *Barker v. Barker*, 15 How. Pr. 568; *Brisbane v. Brisbane*, 67 id. 184; *Walker v. Walker*, 20 Hun, 400; 82 N. Y. 260, 263, 264.) Even if the pecuniary penalties or fines imposed upon parties by reason of their contempt were regarded, in whole or in part, as purely civil remedies, this decree of the Supreme Court of the District of Columbia would still be void as violating the fifth amendment of the Constitution of the United States and depriving the defendants, McDonald and White, of their property without due process of law. (*Murray v. H. L. & I. Co.*, 18 How. [U. S.] 277; *Dent v. West Virginia*, 129 U. S. 123, 124; *M. P. R. Co. v. Humes*, 115 id. 519; *Ex parte Wall*, 107 id. 289; *Hurtado v. California*, 110 id. 535; *Hagar v. R. Dist.*, 111 id. 708; *McVeigh v. U. S.*, 11 Wall. 267; *Ensminger v. Powers*, 108 U. S. 301; *Sabariego v. Maverick*, 124 id. 292, 293.) Whatever may be the conclusion of the court as to the power to punish McDonald and White in the manner adopted by the Supreme Court of the District of Columbia, the judgment or decree so entered against them is not binding upon Riggs & Co., even if they are considered to be purchasers of the bonds *pendente lite*. (*State v. Matthews*, 37 N. H. 454; *B. & O. R. R. Co. v. City of Wheeling*, 13 Gratt. 40; *W. A. & G. S. P. Co. v. Sickles*, 24 How. [U. S.] 341, 342; *Aurora City v. West*, 7 Wall. 102; *Lyon v. P. M. Co.*, 125 U. S. 700; *Reynolds v. Stockton*, 140 id. 270.) Riggs & Co. were not

purchasers *pendente lite*. (*Memphis v. Brown*, 94 U. S. 715; *Secombe v. Steele*, 20 How. [U. S.] 105; *Miller v. Sherry*, 2 Wall. 250; *French v. Hay*, 22 id. 248; Story's Eq. Pl. § 904; 1 Dan. Ch. Pr. 402, 403; *Murray v. Ballou*, 1 Johns. Ch. 566; *Leitch v. Wells*, 48 N. Y. 585; *Holbrook v. Zinc Co.*, 57 id. 616; *Burgess v. Seligman*, 107 U. S. 33.) The plaintiffs' cause of action, if they ever had one, was barred by the six years' limitation, and accrued when Riggs & Co. finally disposed of the bonds in December, 1875. (118 N. Y. 144.) The question of the negotiability of the bonds, which was a distinct ground of defense, seems not to be open upon this appeal, unless the court should deem the bonds on their face negotiable securities, as the referee has found against the defendants on this issue as a question of fact. (*Goodman v. Harvey*, 4 Ad. & El. 870; *Murray v. Lardner*, 2 Wall. 121; *Brown v. Spofford*, 95 U. S. 478; *Shaw v. R. R. Co.*, 101 id. 564; *D. C. Ins. Co. v. Hachfield*, 73 N. Y. 228; *White v. V. R. R. Co.*, 21 How. [U. S.] 575.) The validity of the decree of April 17, 1878, was not passed on in the decision reported 109 U. S. 150. (*Lyon v. P. M. Co.*, 125 U. S. 700; *W., etc., S. P. Co. v. Sickles*, 24 How. [U. S.] 341, 342; *Aurora City v. West*, 7 Wall. 102; *Canter v. A. & O. Ins. Co.*, 2 Pet. 554; *Nelson v. Leland*, 22 How. [U. S.] 48; *B. Co. v. Higgins*, 114 U. S. 263, 264; *Peper v. Fordyce*, 119 id. 471, 472; *Everhart v. Huntsville College*, 120 id. 223; *Blacklock v. Small*, 127 id. 96, 105; *Metcalf v. Watertown*, 128 id. 586, 590; *Cohen v. Virginia*, 6 Wheat. 412; *Hans v. Louisiana*, 134 U. S. 20; *Lovell v. Uragin*, 136 id. 151; *W., etc., R. R. Co. v. Barney*, 113 id. 621; *Gray v. Brignano-dello*, 1 Wall. 627; *Gilman v. Philadelphia*, 3 id. 713.)

HAIGHT, J. This action was brought to have the defendants' testator adjudged to be a trustee of certain bonds for the benefit of the plaintiffs and that they have a lien thereon and that the defendants account to them therefor.

In September, 1873, the mixed commission on British and American claims, sitting at the city of Washington, awarded

to one Augustin R. McDonald the sum of \$197,000 in satisfaction of his claim for cotton destroyed during the war of the rebellion. In the following October the plaintiffs filed in the Supreme Court of the District of Columbia a bill in equity against McDonald and one William White, his assignee, for the sum of \$49,297.50, alleging therein that McDonald was indebted to them under an agreement whereby, in consideration of services to be rendered in the prosecution of such claim, they were to receive a sum equal to twenty-five per centum of the amount that should be recovered and that they have a lien to the extent of such sum upon the award in his favor. Such proceedings were thereafter had that one George W. Riggs, a banker in the city of Washington, was appointed receiver, and one-half of the sum so awarded was paid over to him as such to meet the claim and lien of the plaintiffs. As such receiver and pursuant to the directions of the court, he invested the funds in certain bonds of the District of Columbia guaranteed by the United States and payable at its treasury. The defendants then interposed a demurrer to the plaintiffs' bill, which was sustained, and on the 24th day of June, 1875, a decree was entered dismissing the plaintiffs' bill, with costs. On the same day the plaintiffs entered an appeal from the decree to the General Term of the Supreme Court of the District of Columbia. On June 28th, 1875, another decree was entered in precise conformity with the former decree, but supplemented by a direction to the receiver to pay to the defendants McDonald and White the funds in his hands as such receiver. On the same day McDonald and White called upon the receiver and demanded the bonds in question. He thereupon first consulted with the judge holding the court in which the decree was entered, and, after being advised by such judge that the bonds should be surrendered, he delivered them over to McDonald and White, who on the same day sold and delivered the bonds for full value to the banking firm of Riggs & Co., of which the receiver was a partner. Riggs & Co. then surrendered the bonds to the treasury of the United States,

receiving new bonds therefor, which were thereafter sold and delivered to various purchasers.

On July 2d, 1875, the plaintiffs took an appeal to the General Term of the Supreme Court of the District of Columbia from the decree of June 28, 1875, and on March 4, 1876, that decree, as well as the one that preceded it, was reversed and the cause was remanded to the Special Term, with leave to the defendants to answer. An answer was then interposed, and upon the issues raised thereby testimony was taken at divers times during the years 1876 and 1877. On the 15th day of June, 1877, plaintiffs obtained an order from the Supreme Court of the District of Columbia, requiring the defendants McDonald and White to pay over to the registry of the court the sum which had been delivered to them by the receiver. This order was not complied with, and thereupon the plaintiffs moved that the defendants McDonald and White show cause why they and each of them should not be punished as for a contempt; and such proceedings were thereupon had that they were adjudged to be guilty of a contempt, and that the answer filed by them in the cause be stricken out and removed from the files of the court. Judgment was thereafter entered against them *pro confesso* adjudging that the plaintiffs had a lien upon the bonds.

This action is based upon the judgment so entered, and is prosecuted upon the theory that notice to Riggs of the pendency of the action was notice to all of his partners. (*Weetjen v. St. P. & P. R. R. Co.*, 4 Hun, 529; 3 Kent Com. 105.) The defendants' testator resided in the city of New York, and was one of the members of the banking firm of Riggs & Co. He only was served with summons in this action.

The referee has found, as conclusions of law, "first, that in order to enable the plaintiffs to sustain this action the decree rendered by the Supreme Court of the District of Columbia must be a valid decree, binding upon the defendants; second, that from the operation of that decree the defendants in this action enjoy exemption and immunity under section 725 of the Revised Statutes of the United States; third, that from

the effect and operation of the decree the defendants enjoy immunity and exemption under that provision of the fifth amendment to the Constitution of the United States, which prohibits the deprivation of property without due process of law; fourth, that the Supreme Court of the District of Columbia had no jurisdiction to render the said decree and that the same was and is null and void," etc.

As to the first conclusion of law the parties agree. The controversy is in reference to the other three. The third conclusion is based upon the fifth amendment to the Constitution of the United States, which prohibits the deprivation of persons of property without due process of law. Inasmuch as the consideration of what is due process of law will to some extent be involved in the determination of the validity of the judgment upon which this action is based, we only deem it necessary to consider the second and fourth conclusions of law found by the referee. We shall also, for the purpose of this review, assume, without deciding the question, that Riggs & Co. were purchasers of the bonds *pendente lite*, with knowledge of the existence of the suit, although it appears that the purchase was made after judgment, for full value, in good faith, under the supposition that they had the right to purchase freed from all liens, and that they had no notice that an appeal had been taken. Considering them as such purchasers, were they bound by the determination made in the action then pending? Section 725 of the United States Revised Statutes provides that :

"The said courts (referring to the courts of the United States) shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: Provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, wit-

ness or other person, to any lawful writ, process, order, rule, decree or command of the said courts."

Under this statute the referee has reached the conclusion that the Supreme Court of the District of Columbia had no power to punish the defendants for a contempt by striking out their answer and adjudging that the plaintiffs had a lien upon the bonds.

In *Ex parte Robinson* (19 Wall. 512) FIELD, J., in delivering the opinion for the court, says: "The power to punish for contempts is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject they became possessed of this power, but the power has been limited and defined by the act of Congress of March 2, 1831. The act in terms applies to all courts. Whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may, perhaps, be a matter of doubt, but that it applies to the Circuit and District Courts there can be no question. These courts were created by an act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempt may be inflicted. It limits the power of these courts in this respect to three classes of cases. * * * The law happily prescribes the punishment which the court can impose for contempts. The 17th section of the Judiciary Act of 1789 declares that the courts shall have power to punish contempts of their authority in any cause or hearing before them, by fine or imprisonment at their discretion. The enactment is a limitation upon the manner in which the power shall be exercised, and must be held to be a negation of all other modes of punishment. The judgment of the court disbarring the petitioner, treating it as

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a punishment for a contempt, was, therefore, unauthorized and void."

In *Anderson v. Dunn* (6 Wheat. 204-227) JOHNSON, J., says: "It is true that the courts of justice of the United States are vested by express statute provision with power to fine and imprison for contempt. * * * It is a legislative assertion of this right as incidental to the grander judicial power, and can only be considered authority as an instance of abundant caution, or a legislative declaration that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment."

In *U. S. ex rel. D. & N. O. Ry. Co. v. Atcheson, T. & S. F. Ry. Co.* (16 Fed. R. 853) McCARY, J., says: "The power of the court is limited to the punishment of the party charged with contempt, and under the provisions of section 725 of the Revised Statutes of the United States such punishment must be by fine or imprisonment. That section provides that Circuit Courts shall have power to punish by fine or imprisonment, at the discretion of the court, contempts of their authority. This enactment, says the Supreme Court, is a limitation upon the manner in which the power may be exercised, and must be held to be a negation of all other modes of punishment." (Citing *Ex parte Robinson, supra.*)

In *U. S. ex rel. South. Ex. Co. v. Memphis & Little Rock R. Co.* (6 Fed. R. 237-239) HAMMOND, J., says: "Obedience to an injunction against privileged persons and corporations was sometimes enforced by sequestration, which placed the property of the contemnor in custody until obedience was given. (2 Daniell Ch. Pr. [5th ed.] 1685, 1687; 2 Bish. Cr. L. [6th ed.] §§ 241, 273; *Spokes v. Banbury Board of Health*, L. R. [1 Eq.] 42, and cases cited by these authorities.) Our Revised Statutes, taken from the act of March 2, 1831, c. 99, and prior acts of Congress, have prescribed the mode of punishment, and directed that it shall be by fine or imprisonment, and this operates as a negation of all other modes of punishment." (See, also, *In re Cary*, 10 Fed. R. 622, 625;

In re Graves, 29 id. 60; *Interstate Commerce Com. v. Brimson*, 154 U. S. R. 447-489; *Ex parte Bradley*, 7 Wall. 364.)

It may be that the cases above referred to are not in strict accord with the rule recognized in this state in which a court of equity may refuse to a party in contempt the benefit of proceedings pending in it when asked by him as a favor until he has purged himself of his contempt. (*Brinkley v. Brinkley*, 47 N. Y. 40; *Walker v. Walker*, 82 id. 260; *Gross v. Clark*, 87 id. 272.) But in this state the Supreme Court on its equity side is invested by the Constitution with all the power and authority that formerly existed in the High Court of Chancery in England, the common law remaining in force excepting so far as it has been changed by statute. The legislature in this state, therefore, may not be able to limit or deprive the Supreme Court of any of its jurisdiction or powers.

X Has the Supreme Court of the District of Columbia like jurisdiction and powers? It was created by act of Congress and not by the Constitution. It consequently follows that Congress, which gave it life and invested it with power, may restrict and limit its exercise, and this notwithstanding the fact that it may have given it general jurisdiction in law and equity. To Congress is given the exercise of exclusive legislation in all cases whatsoever over such district as may by cession of particular states and the acceptance of Congress become the seat of government of the United States. (U. S. Const. art. 1, § 17.) It may, therefore, create, empower, limit and remove. In creating the Supreme Court of the District of Columbia it was provided that it "shall possess the same powers and exercise the same jurisdiction as is now possessed and exercised by the Circuit Court of the District of Columbia, and the justices of the court so to be organized shall severally possess the powers and exercise the jurisdiction now possessed and exercised by the judges of said Circuit Court." (Act of March 3, 1863, 12 U. S. St. 762, ch. 91.) The Circuit Court of the District of Columbia and the judges thereof prior thereto had been invested with "all the powers by law vested in the Circuit Courts and the judges of the Cir-

cuit Courts of the United States." (2 U. S. St. ch. 15, § 3, p. 105.) And by the Judiciary Act of 1801, Feb. 13, it was provided "that the Circuit Courts shall have and hereby are invested with all the powers heretofore granted by law to the Circuit Courts of the United States, unless where otherwise provided by this act." (2 U. S. St. ch. 4, § 10.)

By the Judiciary Act passed September 24, 1789, it was provided that "the Circuit Courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state. (1 U. S. St. ch. 20, § 11, p. 78.) This provision was re-enacted in the revision of 1873. (U. S. R. S. § 629.) In 1871 it was provided that "the Constitution and all the laws of the United States which are not locally inapplicable shall have the same force and effect within the said District of Columbia as elsewhere within the United States." (16 U. S. St. ch. 62, § 34, p. 426; § 93, R. S. of Dist. of Col.) By section 760 of the Revised Statutes of the District of Columbia it is provided that "the Supreme Court shall possess the same powers and exercise the same jurisdiction as the Circuit Courts of the United States."

It is thus apparent that the Supreme Court of the District of Columbia and the Circuit Courts of the United States are placed upon the same footing and invested with the same jurisdiction and powers, except as to the residence of parties. They are each given jurisdiction of suits of a civil nature at common law or in equity. Neither have common-law jurisdiction except that conferred by statute, and, consequently, each is controlled by subsequent legislation.

In 1801 the laws of Maryland were continued in force over that portion of the District of Columbia ceded to the government by that state, but this statute only remained in force in so far as it was not inconsistent with other statutes or not

modified or repealed. (R. S. of Dist. of Col. § 92; 2 U. S. St. ch. 15, sec. 1, p. 104.)

Does section 725 of the Revised Statutes apply to the District of Columbia? Our attention has been called to no rule of the Supreme Court of the District of Columbia, or statute, that is in conflict with its provisions. It is not locally inapplicable, and under section 93 of the statute above referred to we see no reason why it is not given the same force and effect within the district that it has elsewhere within the United States. It may be that other sections of the same chapter may not apply to the District of Columbia, but it is because they are either locally inapplicable, or there are local rules or statutes covering the same subject-matter. (See *Hovey v. McDonald*, 109 U. S. R. 150, construing section 1007 of the U. S. R. S.) We consequently are of the opinion that section 725 of the Revised Statutes of the United States is in force in the District of Columbia, and, as construed by the United States courts, it restricts the Supreme Court of the District, in its punishment for contempt, to either a fine or imprisonment.

Was the decree entered in the action against McDonald and White void or was it merely voidable, and are the defendants in this action bound thereby? In 12 Am. & Eng. Ency. of Law at page 1470, under the head of judgments, it is said that "It is an axiom of the law that judgments entered without any jurisdiction are void and will be so held in a collateral proceeding, and there is a strong and growing tendency in all the courts to hold that although a court had jurisdiction over both the person and the subject-matter, but did not have jurisdiction to enter the particular judgment entered in the case, such judgment is void and may be collaterally impeached." (See note 3 thereunder, and note 1 on page 247.)

In *McVeigh v. The U. S.* (11 Wall. 259-267) a libel for information was filed in the District Court for the district of Virginia for the forfeiture of certain real and personal property of one William McVeigh. The libel alleged that he held an office under the Confederate government, and that he had

taken the oath of allegiance to support the Constitution of that government. He appeared by counsel, made a claim to the property and filed an answer. The attorney for the United States moved that the claim, answer and appearance be stricken from the files upon the ground that he was at the time a resident of the city of Richmond within the Confederate lines and a rebel. The motion was granted, and subsequently his default was taken and a decree rendered *pro confesso* for the condemnation and sale of his property. The judgment was reversed in the Supreme Court. Justice SWAYNE, in delivering the opinion, says: "In our judgment the District Court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion our opinion will be confined to that subject. The order, in effect, denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

In *Windsor v. Mc Veigh* (93 U. S. R. 274) the same question was again brought before the court under an action of ejectment to recover certain real property which had been acquired under the decree mentioned in the former case. Justice FIELD, in delivering the opinion of the court, says: "The doctrine invoked by counsel, that, where a court has once acquired jurisdiction, it has the right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction. They are limited to particular classes of action, such as civil or criminal, or to particular modes of administering relief, such

as legal or equitable. * * * Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for libel, or for personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous; *they would be absolutely void*; because the court in rendering them would transcend the limits of its authority in those cases."

In *Ex parte Lange* (18 Wall. 163-176) the prisoner had been convicted of the crime of stealing mail bags. He was sentenced to one year's imprisonment and to pay a fine of \$200, and was on the same day committed to jail in execution of his sentence. On the following day he paid the fine. The statute authorized imprisonment or fine. It did not authorize both. On the next day the prisoner was brought before the court and an order was entered vacating the former judgment and the prisoner was again sentenced to one year's imprisonment. Mr. Justice MILLER, in delivering the opinion of the Supreme Court, says in reference thereto: "We are of the opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone. * * * It is no answer to this to say that the court had jurisdiction of the person of the prisoner and of the offense under the statute. It by no means follows that these two facts make valid, however

erroneous it may be, any judgment the court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with a party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So, if a court of general jurisdiction should, on an indictment for libel, render a judgment of death, or confiscation of property, it would, for the same reason, be void. Or if, on an indictment for treason, the court should render a judgment of attainder whereby the heirs of the criminal could not inherit his property, which should, by the judgment of the court, be confiscated to the state, it would be void as to the attainder, because in excess of the authority of the court and forbid by the Constitution." (*Ex parte Fisk*, 113 U. S. R. 713-718; *In re Bonner*, 151 id. 242; *In re Mills*, 135 id. 263-270; *Ex parte Terry*, 128 id. 289-304; *Ex parte Reed*, 100 id. 13-23; *In re Frederick*, 149 id. 70-76; *Bigelow v. Forrest*, 9 Wall. 339. See, also, note entitled "Want of Authority under Jurisdiction Conferred," in *Morrill v. Morrill*, 11 L. R. A. 157.)

We have examined, but do not here refer to, the cases in which irregularities only appear in the judgments entered, in which it has been held that they are voidable only and cannot be attacked collaterally. The question presented may be close and upon the border, but we are inclined to the view that as to Riggs & Co. the judgment is void; that after the answer had been interposed by the defendants the court had no power to order judgment without a trial of the issues presented. In the language of Justice FIELD, above referred to, the court, although having jurisdiction of the case and of the parties, "is still limited in its modes of procedure and in the extent and character of its judgments."

Assuming that the members of the firm of Riggs & Co. purchased the bonds with notice of the pendency of the action, and that they took the same subject to the determination therein to be made, they had the right to have the questions at issue determined upon the merits. McDonald and

White were, as to them, assignors for value, and they had no power, by acts or declarations thereafter done or made, to impeach the title so transferred to Riggs & Co. McDonald and White could not, by fraud or collusion with the plaintiffs, impair their title, or, by a confession of judgment, deprive them of their rights to the bonds. Riggs & Co. were not parties to that action, and it does not appear that they ever had notice of the proceedings in contempt. As purchasers *pendente lite* Riggs & Co. took the risk of the litigation then pending, but in so doing did not assume the risk of any punishment that might be inflicted upon McDonald and White in an independent proceeding. (*Conner v. Reeves*, 103 N. Y. 527-532; *Ferguson v. Crawford*, 70 id. 253.)

It is contended that the decree striking out the defendants' answer was not based upon the proceedings in contempt; but the proceedings, orders and decree do not support this contention. If the answer was not stricken out as a punishment for the contempt of which the defendants had been convicted, then by what authority were the defendants deprived of their right to a trial and a determination of the issues involved? Again, it is said that section 725 of the Revised Statutes has reference to criminal and not civil contempts, but no such distinction is found in the statute, or is made by the authorities construing the same.

The judgment appealed from should be affirmed, with costs. All concur.

Judgment affirmed. _____

GEORGE G. WILLIAMS et al., as Executors, etc., Respondents,
v. KATHARINE VAN WYCK HADDOCK, an Infant, Impleaded,
etc., Appellant.

As a general rule the owner of real estate, from the time of the execution by him of a valid contract for the sale thereof, is to be treated as the owner of the purchase money and the vendee as equitable owner of the land.

Provisions in such contract making performance on the part of the vendee of his contract to pay a portion of the purchase money and to secure

the balance by mortgage on the premises a condition precedent to a conveyance by the vendor do not take the case out of the general rule. *It seems*, that after a default in the performance of these conditions precedent the rule may not apply.

But prior to a default on the part of the vendee, even where by the contract time is of the essence thereof, there is an equitable conversion within said rule, subject to be reconverted upon the default happening.

On March 18, 1886, C., being the owner of certain premises occupied as a brewery in the city of New York, contracted to sell the same for a sum specified. A part of this was paid down, a part was agreed to be paid on or before March 18, 1887, and the balance on that date by a bond secured by mortgage on the premises. The vendor agreed, on receipt of the second payment and of the bond and mortgage, which were to be delivered at a place specified at twelve o'clock noon of the day specified, that she would execute and deliver a deed of the premises. It was agreed that the vendees should, at the same time and place, purchase the materials, fixtures, etc., used in the business at a price, and on conditions to be agreed to in writing between the parties; otherwise that the vendor would be at liberty to refuse to consummate the sale. In case of failure of the vendees to perform at the time specified, it was provided that all their interest in, or right to, a conveyance should "*ipso facto* cease and determine absolutely." It was also provided that the stipulations of the contract should bind the heirs, executors, etc., of the parties. On March 27, 1886, the parties agreed in writing upon the terms of the purchase of the materials and fixtures. C. died April 22, 1886, leaving a will. The executors duly qualified, and prior to the time specified in the contract for performance they agreed with the vendees to postpone performance until June 1, 1887. On that day the vendees performed and the executors conveyed the premises. In an action brought by the executors to determine, among other things, as to whether the proceeds of sale should be distributed to the next of kin, to the exclusion of one heir not a next of kin, *held*, that there was an equitable conversion of the real estate into personalty at the time of the execution of the contract, and that there was no default; that the executors, acting in good faith, had the right, prior to default, to extend the time of performance; and, therefore, that the next of kin took the avails as personal property to the exclusion of those who were only heirs at law.

Bostrick v. Frankfield (74 N. Y. 215); *Harvey v. Aston* (1 Atk. 361); *Atty.-Gen. v. Day* (1 Ves. Sr. 218); *Scott v. Tyler* (2 Brown's Ch. 431); *Wells v. Smith* (3 Edw. Ch. 78); *Teneick v. Flagg* (29 N. J. Law, 25), distinguished.

Reported below, 78 Hun, 429.

(Argued February 4, 1895; decided February 26, 1895.)

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APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 18, 1894, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

This action was brought by the plaintiffs, who are executors of the will of Catharine M. McCoskry, deceased, against the defendants, some of whom were heirs at law and others next of kin of the testatrix, for the purpose of obtaining judgment directing the conveyance by the defendants, who are the heirs at law and next of kin of such testatrix, of certain real estate owned by her in her lifetime, to the Langdon and Granger Brewing Company, Limited, and also for the purpose of determining what, if any, substantial or beneficial interest the infant defendant had or has in the proceeds of the sale of the premises, and what are the respective rights and interests of the other defendants in the premises and in the proceeds of the sale thereof; also to obtain a construction and interpretation of the provisions of the will of the testatrix in so far as they bear upon the questions involved in the action. It appears that on the 18th day of March, 1886, Catharine M. McCoskry of the city of New York was the owner of premises known as Read's Ale Brewery in the city of New York, between 13th and 14th streets. On that day she entered into a contract for the sale of that real estate to Thomas B. Langdon and Septimus W. Granger for the sum of \$125,000, of which the sum of \$12,500 was paid at the signing of the contract, \$37,500 were to be paid on or before March 18, 1887, and the balance by the giving of a purchase-money mortgage at that date on the premises by the purchasers. The vendor agreed that upon receiving these payments and upon the execution and delivery of the mortgage, with the usual bond accompanying the same, and the payment of interest as provided in the agreement on or before March 18, 1887, she would then execute and give a good and sufficient deed of the premises; these payments were to be made and the bond and mortgage and deed were to be delivered at the Chemical

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Statement of case.

National Bank in the city of New York at 12 o'clock noon of that day. It was also agreed that at the same time and place the vendees should purchase the materials, fixtures, etc., in and about the brewery business and premises at a price and on conditions to be agreed to in writing between them; otherwise the vendor should be at liberty to refuse to consummate the sale of the real estate under this contract. The vendees were to have the right and privilege of occupying the premises as tenants of the vendor for one year from the 18th of March, 1886, or until the closing or consummation of the sale, if sooner completed. The payment of interest, taxes and insurance provided for in the contract was to be accepted in lieu of any further rent for that year. The contract then contained the following provision :

"It is further understood that in case of the failure of the parties of the second part on or before the eighteenth day of March, one thousand eight hundred and eighty-seven, to pay said sum of thirty-seven thousand five hundred dollars and said interest and taxes, and to deliver said bond and mortgage as herein provided, and otherwise to perform said contract on their part, all interest in the said premises and all right and claim to a conveyance thereof shall *ipso facto* cease and determine absolutely, and the premises shall be delivered over to the party of the first part.

"And it is understood that the stipulations are to apply to and bind the heirs, executors, administrators and assigns of the respective parties.

"In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written."

(Signed by the parties.)

On the 27th of March, 1886, the parties to the above agreement also agreed, in writing, upon the terms for the purchase of the materials and fixtures mentioned in the first contract. Subsequently, and on April 22, 1886, Mrs. McCoskry died, leaving a last will and testament which was duly admitted

to probate as a will of real and personal property by the surrogate of the county of New York, and the plaintiffs, the executors named in the will, duly qualified and entered upon the discharge of their duties as such executors. Some little time prior to March 18, 1887, the vendees in this contract and the plaintiffs herein had negotiations in regard to the extension of the time for the payment of the balance of the purchase money and the giving of the purchase-money mortgage, and for the payment for the fixtures and materials of the brewery as agreed to March 27, 1886 between the parties to the agreement for the sale and purchase of the real estate. The result of such negotiations, had been an understanding between the plaintiffs and the vendees in the real estate contract for an extension of the time for closing the contract, from the 18th of March to the 1st of June, 1887, on which last-named day the money payments were made on account for the real estate and in full for the materials, and the executors gave a deed of the premises to the vendees who gave the purchase-money mortgage for \$75,000, as agreed upon. The defendant, Katharine Van Wyck Haddock, is an infant and is the daughter of a deceased nephew of the testatrix, Catharine M. McCoskry who died without ever having had any children. The infant defendant, by her guardian, claims to share in the proceeds arising from the sale of the real estate on the ground that such proceeds represent and are to be deemed real estate, and that she is entitled to her share as one of the heirs at law of Mrs. McCoskry. The next of kin claim that by the contract for the sale of the premises, entered into by Mrs. McCoskry in her lifetime, the character of the real estate became, in equity, changed into personal property, and should be distributed to the next of kin, and as the infant defendant is not one of such next of kin, but only one of the heirs at law, she is not entitled to any portion of the proceeds of such sale. The courts below have decided in favor of the next of kin to the exclusion of the infant, as one of the heirs at law, and have held that the executors had the right, under the provisions of the will of the testatrix, to execute the deed, and that a good title was thereby conveyed

to the purchasers. The infant defendant only has appealed to this court, and the sole question now is whether the courts below were right in excluding the infant heir at law from any portion of these proceeds.

J. Edward Swanstrom for appellant. Under the contract of sale no estate passed to the vendees at the time of its execution. The whole estate, legal and equitable, remained in the vendor and upon her death pending the completion of the contract became at once vested in her heirs. (*Bostwick v. Frankfield*, 74 N. Y. 215; *Higgins v. D. R. R. Co.*, 60 id. 557; *Harvey v. Aston*, 1 Atk. 376; *Wells v. Smith*, 3 Edw. 78.) The doctrine of equitable conversion has no application in a case where equity would, if a bill were filed, refuse to decree specific performance. (1 Hilliard on Vendors, 181, 182; *Atty.-Gen. v. Day*, 1 Ves. 220; *Teneick v. Flaggy*, 29 N. J. L. 25.) Under the provisions of the will there was an equitable conversion of the brewery real estate into personalty only so far as was necessary to satisfy the legacies which were made a specific charge against said real estate. The balance remaining over retained its original character as real estate, and descended to the heirs. (Williams on Ex. [7th ed.] 1808; *Read v. Williams*, 125 N. Y. 570; *Parker v. Linden*, 113 id. 37.) The claim that the infant heir is estopped from asserting any rights in this action by the former adjudication in *Read v. Williams* is wholly untenable. (*Bell v. Merrifield*, 109 N. Y. 211.)

Charles A. Jackson for respondents. The conveyance was ample. (*Holly v. Hirsch*, 135 N. Y. 590.) Defendant has no interest in the conveyance, and it follows clearly that she can have none in that which was given for that conveyance. (1 Sugd. on Vendors [8th Am. ed.], 285, 287.) The contention of the heir at law, that as this contract for sale contains the words: "It is further understood that, in case of the failure of the parties of the second part, on or before the eighteenth day of March, one thousand eight hundred and eighty-

seven, to pay said sum of thirty-seven thousand five hundred dollars and said interest and taxes, and to deliver the said bond and mortgage as herein provided, and otherwise to perform said contract on their part, all interest in the said premises and all right and claim, to a conveyance thereof shall *ipso facto* cease and determine absolutely, and the premises shall be delivered over to the party of the first part," and time was of the essence of the contract, the contract was void for non-performance, and the property, therefore, became the property of the heirs at law, is untenable. (*Pearsall v. Chapin*, 8 Wright, 9; *Brashier v. Gratz*, 6 Wheat. 533; 3 Pars. on Cont. [8th ed.] 385; 1 Sugd. on Vendors, 193.) The matter is *res judicata*. (*Smith v. Smith*, 79 N. Y. 634.)

Manley A. Raymond for executors, respondents.

PECKHAM, J. The question in this case arises upon the true interpretation of the contract for the sale of the brewery entered into on the 18th of March, 1886. The general rule in regard to contracts for the sale of land is that the owner of the real estate from the time of the execution of a valid contract for such sale is to be treated as the owner of the purchase money, and the purchaser of the land is treated as the equitable owner thereof. The vendor is deemed in equity to stand seized in the land for the benefit of the purchaser, and the latter, even before the conveyance to him, can devise the same and it descends to his heir and the land which was agreed to be sold has been turned into money belonging to the vendor. Courts of equity regard that as done which ought to be done; they look at the substance of things and not at the mere form of agreements, to which they give the precise effect which the parties intended. It is presumed that the vendor in agreeing to sell his land intends that his property shall assume the character of the property into which it is to be converted, and it cannot be denied that it is competent for the owner of land thus to make such land into money at his sole will and pleasure. If the vendor die prior to the completion of the bargain, pro-

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vided there have been no default, the heir of the vendor may be compelled to convey and the proceeds of the land will go to the executors as personal property. (Story's Eq. Jur. §§ 790, 791, 1212; Sug. on Vend. [8th Am. ed.] pp. 270, 273, ch. 5; *Baden v. Pembroke*, 2 Vern. Ch. 213; *Fletcher v. Ashburner*, 1 Brown's Ch. 497; *Eaton v. Sanxter*, 6 Simons, 517; *Farrar v. Earl of Winterton*, 5 Beav. 1; *Livingston v. Newkirk*, 3 Jo. Ch. 312; *Champion v. Brown*, 6 id. 398; *Craig v. Leslie*, 3 Wheat. 563.)

The learned counsel for the infant defendant does not deny the existence of the general rule above stated, but he says this equitable conversion is not invariable and that it cannot apply when the intention of the parties is clearly adverse to such a result. (Citing the case of *Bostwick v. Frankfield*, 74 N. Y. 215.) It may be assumed that the rule does not obtain under circumstances which show clearly that the parties never intended that it should, but in this case we think no such exception to the rule can properly be deduced from the contract itself. The argument of the learned counsel proceeds further, and he claims that if the performance of the conditions which the vendees were to perform were by the clear terms of the contract a condition precedent to any conveyance of the real estate by the vendor, that then the rule does not obtain and no estate, legal or equitable, vests in the vendees until the actual performance on their part of such conditions. He says further that the stipulation making time of the essence of the contract is considered by the courts as a condition precedent, and that this contract does make time of its very essence by virtue of the clause to that effect set forth in the foregoing statement of facts. The counsel also maintains that the vendees did not perform their contract on the due day, March 18, 1887, but made default, and the executors had no power to excuse it, hence there was no performance of a condition precedent and the estate never vested in the purchasers until the deed to them, at which time there had been no conversion, and the proceeds have, therefore, come to the executors in the form of real estate which descends to the heir.

It may be said that in most contracts for the sale of real estate, the performance of some act on the part of the vendee is to precede the conveyance by the vendor, and hence such performance might be a condition precedent to such conveyance. These contracts generally provide for the payment of the purchase money, or some portion thereof, and the giving of a mortgage or some security for the portion which is not to be paid in cash, and that upon the payment of the money and the execution of the security the vendor is then to make the conveyance. But we think provisions of that nature found in contracts for the sale of real estate do not, prior to any default, alter this general rule in regard to the equitable conversion of the real into personalty so far as to prevent the ordinary results flowing from such conversion. After the happening of a default in the performance of conditions precedent, a very different case is made. We think there was an equitable conversion at the time of the execution of this contract, and that there has never been any default. The cases cited by the counsel are those generally which have arisen after a default has occurred on the part of the vendees in fulfilling their contract at the time mentioned in the agreement, where time has been made of the essence of the contract. In those cases the right of the vendee, upon tender of performance after the due day, to have a deed of the premises executed and delivered to him has been denied by the courts on the ground that the parties had by their agreement made the performance of a certain act a condition precedent to the right to enforce specific performance of the contract. Where there was a default and a failure to perform such act within the time agreed upon (time being of the essence of the contract), it has been held that courts have no power to make any other or different contract for the parties, and that they would do so by enforcing specific performance where such default existed. It is stated that such a case is not within the principle which allows courts of equity to relieve against failures or forfeitures, such as would arise where time had not been made of the essence of the contract, and the party, within a

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reasonable time after the day designated for its performance, had tendered performance with compensation for delay, in which case the court would relieve upon providing for such compensation.

Counsel for defendant cites the case of *Harvey v. Aston*, decided in the Court of Chancery in 1737 (1 Atkyns, 361) as an illustration of his contention that no estate vests in the case of a condition precedent until the performance of the condition. The case is not an apt illustration of the principle involved here. There was a default and the case was one of a settlement under a trust term for the benefit of the daughters of the testator to pay to each of them the sum of £2,000, if she should marry with the consent of her mother, if living, and a widow; if not then with the consent of the trustees or the survivor of them, his executor, administrator or assigns. The plaintiff Harvey married one of the daughters without this consent and claimed the payment of the legacy. The court (HARDWICKE, Lord Chancellor) held that the plaintiff was not entitled to the portion because of the non-fulfillment of the condition precedent and its violation by the daughter marrying without the requisite consent. In the report a long argument is given of counsel on either side upon the question of the validity of such a condition as being in restraint of marriage, but the court held that it was a valid condition and must be performed before the party was entitled to receive the money. As it had been violated the court could not relieve against the non-performance of the condition.

In *Attorney-General v. Day* (1 Ves. Sr. 218 at 220), cited by counsel, the following language was used by the lord chancellor (HARDWICKE) in his opinion:

"There is no case where the representative of the personal estate is entitled to claim the money arising by sale of the lands as personal estate, except where one or other of the contracting parties in the purchase is entitled to carry it into execution in a court of equity; for, where the court holds it ought not to be executed, there is no conversion of real into

personal, in consideration of the court, upon which that right of the executor depends; for, if not effectually converted into money, it must be considered, according to its original nature, as real, and the heir at law must have the benefit. Whether there is any such conversion depends upon there being an effectual agreement binding upon all the parties so as under all the circumstances it ought to be carried into execution upon this general principle of equity; that what is contracted for valuable consideration to be done will, by the court, be considered as done; all the consequences arising as if it had been so, and as if a conveyance had been made of the land at the time to the vendee. But if the circumstances are such that it cannot now or ought not to be carried into execution, though once it might, these consequences cannot follow, for the court must consider it as land and the money as the parties' own who was to be the purchaser."

This language was used, in 1748, in a case where though specific performance might once have been decreed against original parties holding as tenants in common, yet an alteration in the circumstances had taken place before suit brought which prevented a decree as to one moiety, and the court would not direct a performance as to the other, the contract being entire and the execution of half of it inadequate to the prime subject. In such a case as the court was then speaking of it regarded the alteration of parties and circumstances as furnishing good cause for refusing specific performance, and as the parties refused to perform, it is clear that the land remained with the original owner and the purchase money in the pockets of the would-be purchasers. In its results it was like the case of a default in the performance of a condition precedent. It was not a case for the continuation of the doctrine of equitable conversion, and from the time when the court would refuse to enforce the contract the conversion would cease and the land would regain its original character in the hands of its owner.

The case of *Scott v. Tyler* (2 Brown Chy. 431) is another case of a condition annexed to a legacy. It was argued at

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very great length by counsel and decided by Lord Ch. THURLOW, in 1788, in the same way as *Harvey v. Aston* (*supra*).

The case of *Wells v. Smith* (2 Edw. Ch. 78) is the case of a contract to sell lands where time was of the essence thereof, and the vendee failed to perform the condition at the time mentioned in the contract. In other words, he had defaulted, and the court held by reason of such default, under the terms of the contract which the parties had entered into, it had no power to decree the performance upon tender or payment of the purchase money. But that case is not inconsistent with the principle contended for herein, that even in a contract where time is of the essence there is upon its execution and prior to a default on the part of the vendee, an equitable conversion of the land within the rule contended for. When default is made this equitable conversion falls with the contract and the vendor is re-vested with his original right unimpaired. The vice-chancellor (McCoun) said, in *Wells v. Smith*, that that was a case of a condition precedent where no estate vested in law until the condition was performed. As the legal title did not pass the vice-chancellor said he was not at liberty to suppose the parties intended it should have passed or that any effect was to be given to the contract beyond the plain import of its terms or inconsistent with the rules of law. No one, of course, contends that any legal title passes upon the execution of a contract of this kind, but it is claimed that even in a case where time is of the essence of the contract there is an equitable conversion prior to the default, subject to being re-converted upon the default happening.

The case of *Teneick v. Flagg* (29 N. J. Law, 25) is also cited.

Mr. Justice HAINES in that case, replying to the contention of the defendant's counsel, that by the contract of sale the estate was converted into personalty, and hence that the purchase money went to the administrators to be disposed of in due course of administration, said that "such was undoubtedly the general rule in equity, but that it was not the rule at law. In equity the contract may be specifically exposed and the land regarded as that of the purchaser, and held by the

vendor in trust for him, while the consideration money is deemed to belong to the vendor, and held in trust for him by the purchaser, and equity enforces these several notional trusts. But at law it is otherwise. The purchaser is there left to his action for damages for the breach of the contract, and must take his relief in money, while the title of the land continues in the vendor or his heirs or assigns. The doctrine of equitable conversion is not applicable to estates at law or to courts of law." And as the action in question was an action at law the court held that that equitable doctrine did not prevail. That was a case where land was sold and a part of the purchase money paid, and the deed was executed and placed in the hands of a third person to be delivered to the grantee, and the balance of the purchase money to be paid on the happening of a certain event. The grantee died before the event happened, and it was held that the title to the land did not vest in the purchaser, but descended to the heirs of the vendor, subject to the equitable rights of the purchaser.

That is a different case from the one at bar.

The provision in this contract, that the vendees should also agree thereafter with the vendor for the purchase of the materials and fixtures, etc., in the brewery, with liberty to the vendor to refuse to consummate the sale of the real estate if the other contract were not performed, does not alter the rule above stated. We cannot see in this any intention of the parties that they should not be bound by the general rule in regard to a contract for the sale of land. There is nothing which leads us to suppose that they intended by these provisions to change that rule, but, on the contrary, the whole meaning of the two contracts, taken together, clearly shows, as we think, an intention on the part of the vendor to change that land into money, and on the vendees' part to change their purchase money into land. If the conditions are not performed then the ordinary rule comes into force, and the equitable conversion which existed during the running of the contract ceases, and the parties return to their original positions.

The case of *Bostwick v. Frankfield* (74 N. Y. *supra*) is one

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which shows beyond any doubt that the intention of those parties was that this conversion should not take place. There was a leasehold term outstanding at the time of the execution of the contract of sale, and it appears clearly from the terms used and from the opinion of the court in that case that it was never the intention that that leasehold interest should be merged in the contract for the sale of the land, but that, on the contrary, it should exist as a valid outstanding estate during the time of the running of the contract for the sale of the land, and until its performance according to the terms thereof.

Holding then as we do, that in this case the general rule obtains, it follows that at the execution of this contract the equitable conversion took place. Such was the condition of affairs at the time of the death of Mrs. McCoskry. There had been no default. On the contrary, up to her death all the terms of the contract which the vendees were to perform had been by them performed, and the contract to purchase the materials had also been entered into, and upon her death the rule still obtained as to an equitable conversion of this land. Upon the performance, without default, of the terms of the contract the purchase money would come to the executors as personalty to be distributed by them as such and not to descend to the heirs at law. Under the circumstances we hold with the learned General Term that the executors acting in good faith, of which there is no question, had the right prior to the default to extend the time for the performance of the conditions by the vendees, and when within the time extended, these conditions were performed the equitable conversion which originally took place remained in being and these moneys should go to the next of kin as personal property, to the exclusion of those who are only heirs at law.

For these reasons the judgment should be affirmed, with costs to the respondents and to the guardian *ad litem* for the infant heir at law, to be paid by the executors out of the estate of Mrs. McCoskry in their hands.

All concur.

Judgment accordingly.

145	158
165	509
145	158
169	1804

HORACE G. YOUNG, as Trustee, etc., Appellant, v. SARAH B. OVERBAUGH, Respondent.

A parol gift of real estate and a parol promise to convey the same is valid and enforceable in equity, where the donee has entered into possession of the property and made permanent improvements thereon, on the faith of the donor's promise, and this, although when specific performance by the donee is claimed, the rental value of the property for the time it has been occupied by the latter would be more than the amount expended by him.

In 1872 C., plaintiff's testator, who was half-brother of defendant, and at whose request she and her husband had come to the city of Kingston to reside, requested the husband to build a house for her on land owned by C., at a cost specified, and to bring the bills to him for payment. The house was built at a cost exceeding by about \$1,200 the sum named, which sum C. paid, and defendant went into occupation thereof and made valuable improvements upon the premises, of which C. had knowledge. After defendant had contracted to build the house C. stated that it was built for defendant and was hers, and so spoke of it to different persons at various times. In an action of ejectment to recover possession of the premises, the court found that the improvements, as well as the payment of the \$1,200, were made and expended on the faith of the promises of C. to give the property to defendant. The court also found that the total amount expended by defendant for permanent improvements, repairs, taxes, insurance, etc., from the beginning of the erection of the house to the time of trial was \$4,734.26, and the fair rental value during that period was \$5,000. *Held*, that defendant was the owner of the equitable title; and so, that the action was not maintainable.

Reported below, 76 Hun, 151.

(Argued February 4, 1895; decided February 26, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made January 13, 1894, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granted a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

A. T. Clearwater for appellant. There has never been a consummated gift. (*Cooley v. Lobdell*, 82 Hun, 98; *Eason v.*

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Eason, 61 Tex. 225; *Dunphy v. Ryan*, 116 U. S. 491; *Lydeck v. Holland*, 38 Mo. 703; *Colgrove v. Solomon*, 34 Mich. 494.) The rent of the property is a full compensation for the expenditures alleged to have been made. (*Wack v. Sorber*, 2 Whart. 387; 30 Am. Dec. 269; *Walton v. Walton*, 70 Ill. 142; *Hickenson v. Grimes*, 1 Marsh. 86; *Mahill v. Mahill*, 69 Iowa, 115.) The utmost that can be inferred was an intention upon the part of Cornell to give the property. (*McKay v. McKay*, 15 Gr. Ch. 371; *Foster v. Emerson*, 5 id. 135; *Cox v. Cox*, 26 Gratt. 305; *Taylor v. Staples*, 8 R. I. 170.) The defendant cannot recover upon the ground that she remained at Kingston instead of going to Yonkers. (*Madison v. Alderson*, L. R. [8 App. Cas.] 467; *Gall v. Gall*, 64 Hun, 600.) The Statute of Limitations bars defendant's rights to specific performance. (*Cooley v. Lobdell*, 82 Hun, 98; *Kelly v. Potter*, 16 N. Y. Supp. 446.) The defendant's rights are solely equitable, and, therefore, should not be recognized unless an action for specific performance could be maintained. (*Cavalli v. Allen*, 57 N. Y. 506.)

J. Newton Fiero for respondent. Where a donor has induced a donee to accept a gift and entered upon the land given to the latter, has erected lasting and valuable improvements upon it, courts of equity will not allow the donor to take advantage of the Statute of Frauds. In such case the donee takes the equitable title, and his right to the title may be enforced in a court of equity. (*Lobdell v. Lobdell*, 46 N. Y. 327; 3 Pars. on Cont. 359; *Crosbie v. McDonald*, 13 Ves. 148; *Freeman v. Freeman*, 43 N. Y. 34; *Schroder v. Wanzor*, 36 Hun, 425; *Dana v. Wright*, 23 id. 29; *Knapp v. Hungerford*, 7 id. 588; *Ogsbury v. Ogsbury*, 115 N. Y. 290; *Smith v. Smith*, 125 id. 224.) The general principle contended for is not, however, seriously controverted by the counsel or by the learned court which passed upon the case. A distinction is sought to be made, however, in this case, to the effect that the defendant has occupied the property for a sufficient length of time to be reimbursed for advances made

on her behalf, and, therefore, is not entitled to the relief sought. (*Knapp v. Hungerford*, 7 Hun, 588; *Young v. Glendenning*, 6 Watts, 509.) The doctrine urged by plaintiff cannot be sustained upon principle, aside from the authorities, since the jurisdiction of courts of equity in decreeing specific performance of verbal agreements where there has been part performance, is for the purpose of preventing a party from escaping engagements he has entered into through the Statute of Frauds after the other party to the contract has expended his money, or otherwise acted in execution of the agreement. (*Young v. Glendenning*, 6 Watts, 510; *Schney v. Schaefer*, 130 Penn. St. 23; *Rherick v. Kern*, 14 S. & R. 271; *Seary v. Drake*, 62 N. H. 393.) In this case the defendant had occupied the premises in question, given her by plaintiff's testator, for a period of nearly twenty years, making permanent improvements, paying current expenses, and treating the property as her own in every respect, with the knowledge and acquiescence of the donor. The plaintiff now seeks to make the very lapse of time a reason why defendant should not be entitled to the property. The contrary is the rule. (*Sower v. Weaver*, 84 Penn. St. 262; *Seary v. Drake*, 62 N. H. 393; *Hardesty v. Richardson*, 44 Md. 617.) The order of the General Term must be affirmed, and judgment absolute ordered aside from the merits heretofore discussed upon the erroneous admission of the judgment roll, in which DeWitt C. Overbaugh, the husband of defendant, is the plaintiff, and the executor of Cornell, the defendant. (36 N. Y. 483; 4 Mass. 702.)

GRAY, J. The plaintiff brought ejectment to recover the possession of land and a dwelling thereon, occupied by the defendant and her husband. It was conceded that the legal title was in plaintiff's testator, at the time of his death; but the defendant claimed that she was the owner of the equitable title to the premises, by reason of promises made by the plaintiff's testator to her and of acts done by her in reliance upon those promises.

The facts do not seem to be disputed; but, upon the find-

ings made at the trial term with respect to the facts, the learned judge presiding thereat and the learned justices at the General Term have differed in their conclusions. I will state the facts as they were found. In 1872, Thomas Cornell, the plaintiff's testator, was the owner of the premises in question. He was the half-brother of the defendant and upon his request she and her husband had settled in the city of Kingston. In the year mentioned, Mr. Cornell asked the defendant's husband to build a house for the defendant on a certain piece of his property, at the cost of \$4,500, and to bring the bills to him for payment. The house was built at a cost, which exceeded, by about \$1,200, the sum named by Mr. Cornell, and the defendant, subsequently, made valuable permanent improvements upon the property; such as building a barn, planting of fruit trees, putting in a heating apparatus, etc.; of all which Mr. Cornell had knowledge. Other facts found were that, after the defendant had contracted to erect a house upon the property, Mr. Cornell had stated that the house was built for the defendant and was hers; and so spoke of it to different persons at different times. Upon one occasion, in the year 1876, upon the defendant's husband informing Mr. Cornell that he had found a business at Yonkers, which he thought it would be a good thing to go into, the latter replied, to the effect, that if they moved away from the property where they then resided the defendant should not have it and that they would lose it. There was this specific finding: "That such improvements, as well as the payment of \$1,200, were made and expended on the faith of the promises by Cornell, to give the property to Mrs. Overbaugh (this defendant), and all such moneys were expended, and improvements made, for and on behalf of the defendant and at her request, and under her promise to repay her husband thereafter." There was a finding that the total amount of money expended by the defendant for permanent improvements, repairs, taxes, insurance, etc., and including, also, repairs and expenses, which are incidental to the ordinary care of a house, from the beginning of the erection of the house

down to the date of the trial, was the sum of \$4,734.26 and that the fair rental value of the property of the defendant during her occupancy, for a period of about twenty years, was \$250 per year; amounting in the aggregate to \$5,000.

The learned trial justice conceded the existence of the exception to the general rule, that a parol gift of real estate is void, in a case where the donee enters into possession of and improves the property, upon the strength of the promise that it would be given to her; but he did not think that the present case fell within the exception. He was influenced in that view by a consideration of the nature of the acts done by the defendant, in reliance upon the promise of Mr. Cornell. Regarding the equitable rule to be founded in the idea of preventing an injustice being done to a promisee, if the promisor be permitted to avail himself of the statute, and that the application of the rule is in a case where financial injury will be sustained; he, in the first place, considered that as the defendant's acts were only such as an ordinary householder would be expected to make and, in the second place, as the fair rental value of the premises during the twenty years of the defendant's occupation was worth to her, altogether, a sum which exceeded the aggregate of the sum found to have been expended by her, or at her request, during that time, that if the defendant was compelled to surrender possession of the premises, she would not, in fact, be a loser as the result of the entire transaction with Mr. Cornell, but the gainer. Hence he concluded that there was absent here that element of injustice to the donee; which is essential to exist, in order to entitle him to an enforcement of the donor's promise.

We find ourselves unable to agree with the trial justice in his judgment upon this question and we prefer the view taken at the General Term; that where there has been a parol promise to convey, a taking of possession under such promise and the making of permanent improvements upon the property upon the faith thereof, the mere value of the occupation during the time is not to be set off against the expenditures made. I think it would not be within the spirit of the rule

in equity, that its application should be made to depend, not upon the fact of a consideration for the promise being shown to have existed and to have been performed, but upon the question whether, when specific performance by the donor is claimed, the use has not compensated the donee and relieved the donor's obligation. In *Freeman v. Freeman* (43 N. Y. 34), which was an action of ejectment and where the defense was a parol promise to give the land to the defendant, accompanied by an actual delivery and possession by him; GROVER, J., said: "The question then is, whether a parol promise by one owning lands to give the same to another will be enforced in equity, when the promisee has been induced by the promise to go into possession and, with the knowledge of the promisor, make comparatively large expenditures in permanent improvements upon the land. * * * In the case supposed, there has been no part performance of the contract, strictly speaking, except the taking possession, no part of the purchase money having been paid, and yet the cases are numerous where performance of such contracts has been decreed in equity, where possession has been taken under the contract and large expenditures upon permanent improvements made." Again he says: "Expenditures made upon permanent improvements upon land with the knowledge of the owner, induced by his promise, made to the party making the expenditure, to give the land to such party, constitute in equity a consideration for the promise." It was said by PARKER, J., in *Lobdell v. Lobdell* (36 N. Y. at page 330): "If the promisee, on the faith of the promise, does some act, or enters into some engagement, which the promise justified, and which a breach of the promise would make very injurious to him, this equity might regard as confirming and establishing the promise, in much the same way as a consideration for it would."

In such a case as this, to constitute a good consideration in equity, it is, of course, essential that it be substantial; in the sense that the promise shall rest upon a performance by the promisee, which evidences acceptance of and reliance upon

the promise and consists in expending moneys in permanent improvements upon the land. In this case it may well have been, as found, that some of the expenditures made by the defendant upon the property were such as a householder would ordinarily make, or were trivial in their nature; but they do not influence the character of the others. We have the fact that the house was contracted for upon the promise of Mr. Cornell; that its cost exceeded the sum, which he agreed to be responsible for, by \$1,200, and that there were the other improvements of a permanent character, to which I have adverted as being found. There was, in fact, such a consideration for the promise of Mr. Cornell as to have made it obligatory upon him to perform it, in order that the defendant should not be defrauded and injured. It would be very inequitable to deprive the agreement of its obligatory character, merely because, during the time of the occupation of the defendant under the parol promise, the fair rental value of the premises would amount, in the aggregate, to a sum in excess of the amount altogether expended. If there was the promise to give the property, accompanied by the delivery of possession to the defendant and expenditures in permanent improvements made, in reliance upon the promise, injury will be presumed to follow by a failure to perform it. In enforcing such a promise, equity aims at preventing a fraud upon the donee and regards the case as taken out of the operation of the statute by the part performance.

The case supposed by the learned trial justice, of trivial repairs or improvements by a tenant entering into possession of real estate under a promise that it will be given to him, was not the case before him under his own findings.

I think that the defendant fully made out her claim to be the holder of the equitable title and that she could not be ejected from the premises at the suit of the plaintiff.

The judgment appealed from should be affirmed and judgment absolute ordered against the appellant upon the stipulation, with costs to the respondent in all the courts.

All concur.

Judgment accordingly.

WILLIAM H. MEAKER, as Executor, etc., Appellant v. NANCY A. FIERO, Impleaded, etc., Respondent.

The defense of usury must be founded on the loan or forbearance of money; if neither of these elements exist in a contract there is no usury, however unconscionable the contract may be.

In an action to foreclose a mortgage, wherein the defense was usury, substantially these facts appeared: In 1888 H. executed to S., plaintiff's testator, a bond and mortgage for \$2,500, payable ten years from date. In 1885 H. bid in on foreclosure sale, for the benefit of defendant F., certain real estate, taking title in his own name. In 1886 S. desired H. to reduce his debt to \$1,000, which H. agreed to do if S. would accept in payment \$700 in money and the bond and mortgage of F. for \$800, payable in five years from date. S. desired a bonus for taking the bond and mortgage; this H. refused to pay, but referred S. to F. The parties met; H. executed and delivered to F. a deed of the property so purchased, she executed and delivered in return her bond and mortgage on the premises for \$800. These, with \$700 in money, H. handed to S., who refused to accept them until he received "a present." F. then paid S. fifteen dollars, and thereupon the latter accepted the securities and the money in payment of \$1,500 upon the mortgage of H. *Held*, that the defense was not established; that there was no loan made by S. or forbearance on his part, but simply a change of securities for an existing debt; and that S. could lawfully demand compensation for assenting to the transaction.

Meaker v. Fiero, (77 Hun 65), reversed.

(Argued February 5, 1895; decided February 26, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made March 27, 1894, which affirmed a judgment in favor of defendant entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

John D. Teller for appellant. The contract or agreement under and pursuant to which the mortgage in suit was given, was not a contract for the loan or forbearance of money, and it is essential to constitute usury that there be, in effect and intent, a loan or forbearance of money. (*U. D. S. Inst. v. Wilmot*, 94 N. Y. 22; *Thomas on Mort.* 633; *Spencer v.*

Tilden, 5 Cow. 144; *Perrine v. Hotchkiss*, 2 Lans. 416; *More v. Howland*, 1 Edw. 371; *Dunham v. Cudlipp*, 94 N. Y. 129; *Sickles v. Flanagan*, 79 id. 224; *Elwell v. Chamberlain*, 31 id. 611.) The taking of this fifteen dollars by Stokes was extortion if anything, and extortion is not usury. (Thomas on Mort. § 636; *Guggenheiner v. Griszler*, 81 N. Y. 293; *Morton v. Thurber*, 85 id. 550.) There is a fatal variance between the allegations of the answer and the proof. The defense alleged in the answer is unproved in its entire scope and meaning, and there is a failure of proof. (*Moore v. Leonard*, 20 J. & S. 13; *L. I. Bank v. Boynton*, 105 N. Y. 656; Code Civ. Pro. § 541.) To establish this defense and prove the transaction, out of which it is claimed the usurious agreement arose, Hoskins and his wife were produced as witnesses, and their testimony was taken under the objection of the plaintiff claiming it to be incompetent under section 829 of the Code. In this respect the referee committed an error for which the judgment should be reversed. (*Gerwig v. Sitterly*, 56 N. Y. 214; *Patterson v. Birdsall*, 64 id. 294; *Russell v. Nelson*, 99 id. 119; *Wallace v. Strauss*, 113 id. 238; *Hobart v. Hobart*, 62 id. 80; *Garson v. Green*, 1 Johns. Ch. 308; *Mears v. Kearney*, 1 Abb. [N. C.] 306; *Steele v. Ward*, 30 Hun, 555.) The evidence of Hoskins and his wife was also incompetent, for the reason that they are the persons under whom the defendant derives her interest and title within the meaning of section 829 of the Code. (*Kittle v. Van Dyke*, 1 Sandf. Ch. 81; *Jackson v. Austin*, 15 Johns. 477; *Dusenbury v. Hulbert*, 59 N. Y. 541; *Coutant v. Servoss*, 3 Barb. 128; *Cunningham v. Knight*, 1 id. 399; *Smith v. Cross*, 90 N. Y. 549; *Geissman v. Wolf*, 46 Hun, 289; *Foots v. Beecher*, 78 N. Y. 155; *Holcomb v. Holcomb*, 95 id. 316; *Hoffman v. Hoffman*, 18 id. 387.)

F. B. Wright for respondent. Plaintiff's contention, that although the sum of twenty-five dollars, over and above the legal rate of interest, was demanded by Stokes, the mortgagee, and fifteen dollars was actually received by him from the mort-

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gagor, in excess of the legal interest and as a bonus, yet that this was not usury because, as the plaintiff alleged, it was not a loan or forbearance of money, is untenable. (Taylor on Usury, 72, 102; *Ayres v. Chamberlain*, 32 Barb, 229; *Hall v. Ernest*, 36 id. 585; *Birdsall v. Patterson*, 51 N. Y. 43.) The evidence of Mr. and Mrs. Hoskins, who were sworn as witnesses for the plaintiff, was competent. (26 N. Y. 264; 36 id. 327; *Moore v. Oviatt*, 35 Hun, 216; *Miller v. Montgomery*, 78 N. Y. 282; *Hobart v. Hobart*, 62 id. 80; *In re Hanley*, 44 Hun, 559, 560; *Wallace v. Straus*, 113 N. Y. 238; *Connelly v. O'Connor*, 117 id. 91; *Beakes v. Da Cunha*, 126 id. 293-298.)

ANDREWS, Ch. J. This action was brought for the foreclosure of a mortgage for \$800, executed by the defendant, Nancy A. Fiero, to Samuel Stokes, the plaintiff's testator, dated May 28, 1886, and acknowledged May 29, 1886, to secure the payment of a bond of the mortgagor of the same date and amount in five years thereafter, with annual interest. The defense was usury. This defense was sustained by the referee before whom the action was tried, and the judgment entered upon his report has been affirmed by the General Term. The alleged usury consists in the payment by the mortgagor to the mortgagee at the time of the delivery of the bond and mortgage of the sum of \$15.00.

We think the evidence failed to establish any usurious transaction, for the reason that the contract or agreement under which the bond and mortgage were given was not a contract or agreement for the loan or forbearance of money, and that the sum of \$15.00 exacted by Stokes and paid by the mortgagor was exacted by Stokes as a condition of his acceptance of the bond and mortgage in question, as payment on a debt of \$2,500 secured by mortgage on other property maturing in 1893, owing by one Hoskins to Stokes, and that the sum of \$15.00 was paid by Mrs. Fiero in compliance with this condition.

The evidence of the transaction upon which the alleged

usury is predicated comes from witnesses on the part of the defendant. Stokes died in 1889. Several payments of interest were made on the mortgage prior to his death, and it does not appear that the validity of the mortgage was questioned until after that time. It appears that in 1883 one Hoskins (the brother-in-law of Mrs. Fiero) executed to Stokes his bond and mortgage for \$2,500, payable ten years after its date, and that on the 29th day of May, 1886 (the day when the bond and mortgage in question were executed), the whole principal sum of the Hoskins debt was unpaid. In 1885 Hoskins bid in at foreclosure sale, for the benefit of Mrs. Fiero, a lot on Washington street, Auburn, taking title in his own name to secure his advance on the property. On the 29th day of May, 1886, the situation was that Mrs. Fiero was entitled to a conveyance of the lot from Hoskins on payment to him of \$800. Hoskins, the principal witness for the defendant, testified in substance that on or about the 28th of May, 1886, Stokes came to him and desired him to state to the assessors that his debt to Stokes was only \$1,000; that he refused to do so, whereupon Stokes informed him that he had so sworn before the assessors; that he told Stokes he had perjured himself and that it would go hard with him "if they got on to it;" that, after some further conversation, he told Stokes he could help him out if he would take a mortgage of \$800 on the Washington street lot, and \$700 in money as payment of \$1,500 on the mortgage for \$2,500; that Stokes agreed to do this, but said, "you will give me \$25, the same as you promised me six months ago," and that he replied, "No, sir; this is not for my accommodation, it is to accommodate you. This will be a transaction between you and Mrs. Fiero, and you can make a bargain with her if you want a bonus." Hoskins further testified that Stokes requested him to draw the papers, and they were to meet the next morning to complete the transaction. Hoskins drew a deed from himself to Mrs. Fiero of the Washington street lot, and a bond and mortgage from her to Stokes on the same lot for \$800. The next day (29th of May) Stokes, Hoskins and Mrs. Fiero met at Hoskins' office. The deed from Hoskins to

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Mrs. Fiero of the Washington street lot, and the bond and mortgage from Mrs. Fiero to Stokes for \$800 on the same lot were duly executed and acknowledged, and an indorsement was made on the mortgage held by Stokes against Hoskins of the payment of \$1,500. Hoskins delivered his deed to Mrs. Fiero and passed the bond and mortgage from Mrs. Fiero to Stokes, with \$700 in money, across the table to Stokes, who declined to receive them, saying, "No; I want to know something about that present," and Hoskins then said to Mrs. Fiero, "Stokes wants a bonus on this mortgage." Mrs. Fiero then approached Stokes and said, "What is it, Mr. Stokes?" and he replied, "I am always in the habit of taking a present when I take a mortgage and I want one now," and in reply to her question as to the amount, he said, "twenty-five dollars." She finally paid him \$15.00, and Stokes then took the mortgage and the \$700 in money. A witness (Kennedy) who was in the room and heard the conversation, a lawyer, introduces the word "loan" in the answer made by Stokes to the question of Mrs. Fiero. His statement is that Stokes said, "I must have a present in this matter. People generally make me a present when I make a loan — take a mortgage."

The foregoing is a statement of all the material facts to sustain the defense of usury. It requires a very strained and unnatural construction of the evidence to convert this transaction into a loan of money. The defense of usury must be made out as any other defense. Where the evidence is conflicting, and the evidence to sustain it justifies the inference of a usurious transaction, and the trial court has found in favor of the defendant, and the finding has been sustained by the General Term, this court cannot interfere. But it is always open here to determine whether there is any evidence to sustain a finding of fact, and the finding of a material fact, without any evidence to sustain it, is error of law. It is perhaps unnecessary to repeat what has often been said that usury may exist although the transaction does not take the direct form of a loan of money. The usurer usually seeks to conceal the usury, and to accomplish his purpose by indirect methods;

but no matter what the disguise, if the court can see that the real transaction was the loan or forbearance of money at usurious interest, its plain and imperative duty is to so declare, and to hold the security void. But where a transaction is capable of an innocent construction, and can only be held usurious by wresting it from its relation to other facts, or by imputing to the facts a sense and meaning which they cannot reasonably bear, then it is equally the plain duty of the court not to adjudge a forfeiture, but to preserve the contract and hold the parties to their respective obligations. There is no presumption that a contract is illegal or criminal. The illegality, if alleged, must be established by proof. The contract may be illegal in its nature, or may be shown to be so by extrinsic facts. It is a fundamental principle governing the law of usury that it must be founded on a loan or forbearance of money. If neither of these elements exists, there can be no usury, however unconscionable the contract may be. The law declares that no one shall loan money exacting for its use more than legal interest, or, having loaned money, he shall not exact a greater rate as a condition of postponing payment.

It is conceded that Stokes gave no money to Mrs. Fiero, and that she received none. The transaction between Hoskins and Stokes was a payment by a debtor to his creditor of \$1,500 upon an admitted debt, in part by causing a transfer of a debt owing to him to be made by his debtor, Mrs. Fiero, to his creditor, Stokes. The transaction between Hoskins and Mrs. Fiero was a payment by her to him of her debt of \$800 by inducing Stokes to take the mortgage on her land in payment of so much of the debt owing by Hoskins to him, and this payment being made and accepted she acquired a right to a conveyance from Hoskins of the legal title to her land. The transaction between Stokes and Mrs. Fiero was the acceptance by him of the \$800 mortgage executed by her, as payment by Hoskins of so much on his mortgage of \$2,500. The \$15 was exacted by Stokes for his consent to make a change of securities, thereby releasing the land mortgaged by Hoskins to the extent of \$800 from the lien of his mortgage,

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and substituting the mortgage of \$800 given by Mrs. Fiero as security for that sum. This was, we conceive, a legal and valid transaction. Stokes was not bound to make any change in his security. The mortgage of Mrs. Fiero was not only on different land, but the terms of payment were different. Stokes could lawfully demand compensation for assenting to the transaction. It is immaterial what his motive was in assenting, or that the exaction of \$15.00 was made, as a way of getting more than six per cent on his investment. There was no borrowing and no lending. There was no loan, and in the absence of a loan in law or fact there was no usury. The transaction was not usurious as an agreement for forbearance. The original mortgage of \$2,500 was not payable until 1893. The mortgage in question was payable in 1891.

We think no defense was made out and the judgment of the Special and General Terms should be reversed and a new trial granted, with costs to abide the event.

All concur, except HAIGHT, J., not sitting.

Judgment reversed.

HARRIET A. BRADY, as Executrix, etc., et al., Respondents, v.
PATRICK CASSIDY et al., Appellants.

Plaintiffs, whose testator had carried on a manufacturing business, executed a bill of sale to defendants of "the entire manufactured stock * * * on hand at foundry and store rooms" at prices specified. Portions of the property covered by the bill of sale were delivered to and taken possession of by defendants. Another portion was omitted from the inventory taken immediately after the execution of the bill of sale and was delivered to other parties under a claim made by plaintiffs that, at the time of such execution, the articles so omitted had been sold to those parties. In an action to recover the contract prices for the goods delivered, defendants alleged a breach of the contract of sale in the failure to deliver the articles omitted from the inventory, and that this was a condition precedent to a right of action. Plaintiffs thereupon amended their complaint setting up a waiver of the condition that all the goods were to be delivered. On the trial, plaintiffs were permitted to prove, under objection and exception, that during the negotiation which resulted in the sale it was spoken of and understood between the

parties that plaintiffs had sold or agreed to sell a portion of the goods included in the bill of sale, and that these sales were assented to and acquiesced in by defendants; that just prior to the execution of said bill, certain of the goods were piled up and marked as sold to other parties; that, subsequent to the delivery of the bill, defendants assisted in making delivery of some of the goods to the vendees thereof, and that they acquiesced in such sales. Plaintiffs also gave evidence to the effect that the delivery of the goods mentioned in the inventory was received by defendants as a fulfillment of the requirements of the bill, and that they acquiesced in the partial delivery, only claiming damages for the omission to deliver all the goods. *Held*, that the evidence was properly received, and justified a finding of a waiver of full performance of the contract; and that plaintiffs were entitled to recover the contract prices for the goods delivered, deducting defendants' damages resulting from a failure to deliver the balance.

Brady v. Cassidy (104 N. Y. 147), distinguished.

(Argued February 6, 1895; decided February 26, 1895.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made June 5, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict and also affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

John E. Parsons for appellants. It was error for the trial court to refuse to instruct the jury that the plain meaning of the contract was that all the goods in the premises were sold; that the words "goods on hand" meant goods physically in the premises at the time. (*Hinneman v. Rosenback*, 39 N. Y. 98; *Whitford v. Laidler*, 94 id. 145; *Brady v. Read*, Id. 631; *Eighmie v. Taylor*, 98 id. 288; *Long v. I. Co.*, 101 id. 638; *Corse v. Peck*, 102 id. 513; *Kennedy v. Porter*, 109 id. 526; *Walton v. Ag. Ins. Co.*, 116 id. 317; *Thomas v. Scutt*, 127 id. 133.) The erroneous disregard of the previous decision of this court was not cured by other portions of the charge; nor does the verdict of the jury show that the defendants were not harmed by it. (*Chapman v. McCormick*, 86 N. Y. 479; *A. N. Bank v. Wheelock*, 13 J. & S. 220; *Thur-*

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ber v. Hughes, 15 id. 172; *Foots v. Beecher*, 8 Wkly. Dig. 520; *Benham v. Casey*, 11 Wend. 83; *Alger v. Vanderpoel*, 2 J. & S. 170; *Heyne v. Doerfler*, 124 N. Y. 505; *In re Eysamen*, 113 id. 62; *Anderson v. R. R. Co.*, 54 id. 334, 341; *Brogue v. Wood*, 67 id. 499; *Huntington v. Connelly*, 33 Barb. 208; *Clark v. Vorce*, 19 Wend. 232; *Wardell v. Hughes*, 3 id. 418; *Allen v. Way*, 7 Barb. 516.) It was error for the court to permit a recovery without proof by the plaintiffs of the value of the delivered goods. (*Dermott v. Jones*, 2 Wall. 1; *Champlin v. Rowley*, 18 Wend. 187; *Jennings v. Camp*, 13 Johns. 94; *Linningdale v. Livingston*, 10 id. 36; *Heyward v. Leonard*, 7 Pick. 186; *Ryan v. Dayton*, 25 Conn. 192; *Carroll v. Weld*, 26 Tex. 147; *Allen v. McKibbin*, 5 Mich. 454.) The motion made by defendants at the close of the case to dismiss the complaint upon the ground that there was no evidence of the reasonable value of the property delivered should have been granted. Not only did the court permit a recovery without proof of the value of the delivered goods; it erroneously excluded evidence about the goods to show that no contract price was applicable to those that were not delivered. (*Parsons v. Sutton*, 66 N. Y. 98.) The court erred in charging the jury about what constituted a waiver of the delivery of the omitted goods sold to them under the contract. (*Hewitt v. Miller*, 61 Barb. 567.) The mere acceptance by the defendants of the goods that were delivered did not waive their right to a delivery of the residue. (*Smith v. Brady*, 17 N. Y. 173; *Catlin v. Tobias*, 96 id. 217; *Champlin v. Rowley*, 18 Wend. 189; *Paige v. Ott*, 5 Den. 402; *Mead v. Degolyer*, 16 Wend. 632.) It is well settled in this state that a party cannot recover upon an entire contract which he has only partially performed. (*Benj. on Sales*, 666; *Kein v. Tupper*, 52 N. Y. 555.)

Henry A. Forster for respondents. The court did not err in refusing to charge that "the plain meaning of the contract of sale is that all the goods in the premises of the plaintiffs on the 20th day of June, 1883, were sold to the defendants,"

and that "the words 'goods on hand' mean goods physically in the premises at the time of the use of such words." (*Randall v. Packard*, 142 N. Y. 47, 55-57; *Chellis v. Chapman*, 125 id. 215, 223, 224; *Hickenbottom v. D., L. & W. R. Co.*, 122 id. 91, 98-100; *Losee v. Buchanan*, 51 id. 492; *Caldwell v. N. J. S. Co.*, 47 id. 282, 286, 287; *Sperry v. Miller*, 16 id. 413; *Hine v. Bowe*, 114 id. 357; *Raymond v. Richmond*, 88 id. 671; *O'Connell v. People*, 87 id. 377, 381; *Kissenger v. N. Y. & H. R. R. Co.*, 56 id. 538, 543; *Holbrook v. U. & S. B. R. R. Co.*, 12 id. 236; *Kelly v. Jackson*, 6 Pet. 622.) Evidence that before the execution of the contract of sale the defendants knew that the plaintiffs intended to remove part of the goods, and assented to such removal, was competent as part of the evidence to prove the agreement for a rescission of the contract of sale. (*Woodruff v. I. F. Ins. Co.*, 83 N. Y. 134; *McNally v. P. Ins. Co.*, 137 id. 389; *Forward v. U. Ins. Co.*, 142 id. 382.) The jury were not bound to award the defendants the full amount of their counterclaim. (*Blade v. Noland*, 12 Wend. 173; *Riggs v. Tayloe*, 9 Wheat. 483, 487; *Byrnes v. Byrnes*, 102 N. Y. 5, 9, 10.) The plaintiffs were entitled to recover the contract price of the goods received by the defendants, less the defendants' damages for the non-delivery of the goods they did not receive, and the court properly denied the motions to dismiss the complaint, because the reasonable value of the goods delivered had not been proved. (*Avery v. Willson*, 81 N. Y. 341, 348; *Dalzell v. F. W. Co.*, 138 id. 285, 290; *Parke v. F. A. T. Co.*, 120 id. 51, 54, 57; *Heckmann v. Pinkney*, 81 id. 211, 213, 214; *Cassidy v. Le Fevre*, 45 id. 562, 566; *Krom v. Levy*, 3 T. & C. 705, 708; *Vanderbilt v. E. I. Works*, 25 Wend. 665; *Crouch v. Gutmann*, 134 N. Y. 45, 51; *Flaherty v. Miner*, 123 id. 382, 388; *Nolan v. Whitney*, 88 id. 648; *Woodward v. Fuller*, 80 id. 312, 315, 316; *Phillip v. Gallant*, 62 id. 256, 264; *Pullman v. Corning*, 9 id. 93, 95-99; *Smith v. Brady*, 17 id. 173, 174, 182-188; *Catlin v. Tobias*, 27 id. 217, 222; *Kein v. Tupper*, 52 id. 555; *Mead v. Degolyer*, 16 Wend. 632; *Champlin v. Rowley*, 18 id. 187; *Paige v. Ott*,

5 Den. 406.) The measure of damages on the defendants' counterclaim was the difference between the contract price of the goods which were not delivered and the market value of those goods, and evidence of the speculative and conjectural profits the defendants might have made from the sale of goods was properly excluded. (*McKnight v. Dunlop*, 5 N. Y. 537, 544; *Dana v. Fiedler*, 12 id. 40, 47, 51; *Parsons v. Sutton*, 66 id. 92, 96; *Cahen v. Platt*, 69 id. 348, 351; *Roberts v. Benjamin*, 124 U. S. 70, 73; *Grand Tower Co. v. Phillips*, 23 Wall. 472, 479, 480; 2 Sedg. on Dam. [8th ed.] §§ 734, 736; *Stevens v. Lyford*, 7 N. H. 360, 366, 367; *Cosfield v. Clark*, 2 Col. 102, 106, 107; *Furlong v. Polleys*, 30 Maine, 491, 493; Benj. on Sales [Bennett's 6th Am. ed.], § 870, pp. 867, 902; 2 Benj. on Sales [Corbin's 6th Am. ed.], § 1306.) The defendants waived the non-delivery of part of the goods, and the court properly charged that if they waived the incomplete delivery they became liable to pay for the goods they received, less the damages resulting from the non-delivery of the remainder. (*Avery v. Willson*, 81 N. Y. 341; *Morris v. Rexford*, 18 id. 552, 557; *Rodermund v. Clark*, 46 id. 354, 357; *Fowler v. B. S. Bank*, 113 id. 450, 455-459; *Conrow v. Little*, 115 id. 387, 394; *Terry v. Munger*, 121 id. 161, 167, 168.) The defendants rescinded the contract of sale as to the goods they were hired to deliver to third persons, and the charge that if they acquiesced in and assented to the non-delivery of any goods that were contracted to be sold and delivered, that was a modification of their original contract, and they cannot recover damages for such non-delivery, was right. (*O. P. R. Co. v. Forrest*, 128 N. Y. 83; *Sturtevant v. Orser*, 24 id. 538, 540-546; *Ash v. Putnam*, 1 Hill, 303, 309, 310; *Healy v. Utly*, 1 Cow. 345, 352, 353; *Folsom v. Cornell*, 150 Mass. 115, 118, 119; Story on Sales, § 419; 1 Benj. on Sales [6th Am. ed.] §§ 782-785; *Fullager v. Reville*, 3 Hun, 600-602; *De Peyster v. Pulver*, 3 Barb. 284, 287; *Tice v. Zinsser*, 76 N. Y. 549, 552; Gerard's Titles to Real Estate [2d ed.], 479; *Alden v. Thurber*, 149 Mass. 271.)

PECKHAM, J. This action is brought by the executrix and the executor of the will of Alfred Brady, deceased, against the defendants to recover from them the contract price of certain articles alleged to have been sold by the plaintiffs to them in 1883. Alfred Brady, prior to his decease in January, 1883, had carried on the business of making and selling plumbers' castings at a foundry and warerooms in New York city. After his death the executrix and executor determined to sell the plant and also the materials on hand at the time. They effected a contract with the defendants by which the latter purchased the plant at a price agreed upon and also leased the foundry from the plaintiffs from the day of the sale in June, 1883, up to the 1st of January, 1884. On the 20th day of June, 1883, the parties entered into another contract by which the plaintiffs sold to the defendants their stock and executed an assignment thereof as follows:

"Sold to Cassidy & Adler the entire manufactured stock, in good condition, consisting of pipes, fittings, fines, etc., now on hand at foundry and storerooms on Fifty-fifth and Fifty-sixth streets, Tenth and Eleventh avenues. The price on same to be eighty (80) per cent from the list price, besides the sum of \$700; the stock to be taken without tarring and to be left on premises, the same to be paid for in cash. The receipt of \$100, as part payment of same, is hereby acknowledged.

"I. WINTERBOTTOM,

"Executor."

Certain portions of the property were delivered to and taken possession of by the defendants, while another portion, consisting of certain pipes and other materials, were omitted from the inventory which was taken immediately after the bill of sale, and were not received by the defendants, but most of them were delivered to other parties under a claim made by the plaintiffs that at the time of the execution of the bill of sale such goods so delivered to those third parties had been sold to them. The case has been twice tried and has been once before in this court (104 N. Y. 147). Upon the first trial the

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plaintiffs claimed the right to give parol evidence in regard to the meaning of the contract above set forth so far as to allow the jury to determine what the parties meant by the terms, "the entire manufactured stock in good condition on hand at the foundry." The courts below permitted evidence of that kind to be given and the plaintiffs attempted to show that this language was not intended to mean that portion of the stock which was on hand in the foundry, but which the plaintiffs had sold or agreed to sell to third parties and which was to be delivered to them in accordance therewith. The inventory which was made showed that the net price of the property included therein was nearly \$12,000. The defendants claimed that the property which was not included in the inventory and which was not delivered to them consisted proportionally of the most valuable part of the stock, and they claimed damages for its removal from the foundry. Upon appeal to this court it was held that the contract was entirely plain on its face and that parol evidence was not admissible for the purpose of explaining or altering its obvious meaning; that the language used embraced all the stock on hand at the time of the execution of the bill of sale to which the plaintiffs had a legal title and which they were entitled to dispose of to the defendants, and that even if a valid executory contract of sale had been made by the plaintiffs to third persons prior to the sale to the defendants, those third persons acquired no title to any specific property, and on the refusal of the vendors to fill the orders they had only a right of action for damages, the legal title to the property remaining in the vendors, and they were bound to deliver it to the defendants under this contract.

The judgment was, therefore, reversed and a new trial granted. The plaintiffs had never pretended that the defendants had received all the goods which were in fact on hand at the foundry at the time of the execution of the contract of sale, but they had claimed on the trial that that contract, when properly construed, did not call for such of the goods, which, although on hand at the foundry, had at the time of this contract been already sold, or contracted to be sold, to other par-

ties. The parol evidence which they offered was, therefore, addressed to the object of explaining the meaning of the language of the written bill of sale as in accordance with the contention. As this court held that evidence of that nature was incompetent for any purpose of explaining the meaning of the writing, the plaintiffs were compelled to find, if possible, some other ground upon which to recover payment for goods which they had in fact sold and delivered to defendants, and for which they had never been paid anything but the original \$100 upon the execution of the contract. The complaint was, therefore, amended by inserting an allegation that the defendants received all the goods which were spoken of in the inventory, and which did not include the omitted goods, and accepted and appropriated the inventory goods without intimating to the plaintiffs that they were received or accepted with any conditions whatever, and without any intimation or notice to the plaintiffs that they should not thereby consent to become liable to pay for the articles so delivered and accepted, unless the other articles were also received; and the plaintiffs alleged that the defendants waived the condition that all the goods included in the agreement and on hand at the time of its execution should be delivered before they should become liable to pay the contract price for the part that actually was delivered, and that they only reserved the right to claim and receive from the plaintiffs the damages which they had sustained by the plaintiffs' failure to deliver all the goods. Upon this pleading the parties went to trial the second time. Upon that trial the plaintiffs proved, under the objection and the exception of the defendants, that during the negotiations which resulted in the written bill of sale, it was spoken of and understood between the parties that the plaintiffs had then sold or agreed to sell a certain portion of the goods which were, by the terms of the bill of sale, included in the sale to the defendants; and that such sale was assented to and acquiesced in by the defendants; that subsequent to the execution of the contract of sale the defendants themselves assisted in making delivery of some of those goods to vendees thereof, and that just prior to the

execution of the bill of sale certain of the goods had been piled up and marked as having been sold to other parties, and that one of the plaintiffs had said to one of the defendants that sales were going on quite rapidly, and unless they agreed pretty soon they would have nothing to purchase, and the defendant replied that the more was sold to others the less they would have to pay for. The plaintiffs also gave evidence that the delivery of the goods mentioned in the inventory was received by the defendants as a fulfillment of the requirements of the bill of sale, and that they acquiesced in such partial delivery as a delivery under the terms of the contract, and only claimed that they were entitled to certain damages which resulted from the omission of the plaintiffs to deliver all the goods, as provided for in the contract. All this evidence the defendants' counsel claims was in direct violation of the rule laid down by this court when this case was here on a former appeal. If it had been offered and received for the purpose of thereby explaining the meaning or altering the effect of the written contract that was entered into between the parties, such ruling would have been clearly erroneous, and in direct opposition to the ruling of this court; but it frequently occurs that evidence which is improper for one purpose may be very material and competent for another, and cases are constantly arising where evidence is thus admitted. In this case it is clear that it was admitted for the purpose of proving the allegation in the complaint, which sets up substantially a waiver by defendants of full performance of the contract on the part of the plaintiffs. The contract in question contemplated one single delivery of the goods mentioned in the contract, and on hand in the foundry at the time of its execution. If but a portion of the goods were delivered and nothing said by the defendants in regard to the necessity for the delivery of the balance of the goods before they were to be called upon for payment, or if there were no evidence other than the fact that a portion of the goods only had been delivered, there would be no ground whatever upon which to base any claim that the defendants waived the full compliance with the terms

of the contract by the plaintiffs. If, however, the facts above stated were proved, there would be sufficient foundation upon which to rest the allegation of a waiver on the part of the defendants, as alleged in the amended complaint. It is no objection to evidence which characterizes and explains the facts which occurred at the time of the delivery of a portion only of the goods, that such explanatory matters occurred before or at the time of the execution of the contract itself, and not at the time when the partial delivery was made. If the facts, whenever they occurred, tend to explain the circumstances attending the failure to deliver all the goods and to show that such failure was understood, acquiesced in and assented to by the defendants, the evidence itself is competent. The evidence given on the part of the plaintiffs, if believed by the jury, was sufficient to constitute a waiver by the defendants of the full performance of the contract by the delivery of all the goods included in its terms, and it was sufficient to justify the jury in finding for the plaintiffs in the amount of the contract price for all the goods actually delivered, deducting therefrom the defendants' damages resulting from the failure to deliver the balance. (*Avery v. Willson*, 81 N. Y. 341; *Parke v. Franco-American, etc., Co.*, 120 id. 51-56; *The Fahys Watch Case Co.*, 138 id. 285-290.)

Another ground for questioning the correctness of this judgment is stated in the alleged refusal of the court to instruct the jury that the plain meaning of the contract was that all the goods on the premises were sold, that the words "goods on hand" meant goods physically in the premises at the time. This request was made as referring to the goods on hand in the foundry at the time of the execution of the bill of sale and it was in reference to the goods which the defendants were entitled to receive and to have delivered to them under the contract. If the court had made no prior reference to this contract and its meaning and the obligations of the parties arising out of its execution, and had refused to charge as requested, the defendants would have had a good exception. Upon reading through the charge of the learned judge we

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think that the rights of the parties as governed by the terms of the contract were correctly stated and that the defendants suffered no harm by the refusal of the court to charge in the language of the request. There was really no doubt or dispute in regard to the meaning of the contract and the whole question in difference between the parties rests substantially upon the issue of waiver and as to the real damages which the defendants had sustained by the failure to deliver certain goods which were known and in regard to which there was substantially no dispute whatever.

It is claimed that by the charge of the learned judge the jury was permitted to say whether the contract embraced the omitted goods. We think this is incorrect. What they were called upon to decide was whether there had been any failure to deliver all the goods mentioned in the contract and if there had been such failure whether the defendants had waived full performance and whether they had been damaged and the extent of such damage by plaintiff's failure. All the merchandise which the plaintiffs contracted to deliver was correctly stated by the court. What portion they did deliver was submitted to the jury for its determination, as was also the question whether the defendants waived the delivery of that portion which the plaintiffs omitted in the inventory, and then the further question of the damage sustained by the defendants was also submitted. This was a fair, while at the same time, a correct and legal interpretation of the obligations of the parties and the verdict of the jury ought not under such circumstances to be interfered with, unless some error has been committed of so material a nature as to cause injustice to the defendants.

- The point that the plaintiffs should not have been permitted to recover anything on account of the goods delivered without proof as to their value is not well taken. The defendants claim on this proposition that the plaintiffs failed to comply with the terms of the contract in that they failed to deliver all the merchandise included in its terms, and by reason of such failure they are not entitled to recover the con-

tract price of any goods which they did deliver, but are to be limited to a *quantum meruit*. The answer to this objection has, I think, already been given, and it consists in the fact which the jury were permitted to find from the evidence that the defendants waived the full performance of the contract by the plaintiffs and received the goods actually delivered as a delivery under such contract, and at the contract price, and they are, therefore, liable to pay such price after deducting defendants' damages. (*Avery v. Willson*, 81 N. Y. 341, and other cases cited, *supra*.)

The actual receipt of the goods under the contract, as the compliance called for by the contract subject to the reduction spoken of, was valid and binding as a waiver when fully executed and assented to by all parties.

The other questions which the defendants have argued we have regarded with care, but do not find any errors in the rulings of the court below which call for a reversal of the judgment. The contract was entered into nearly twelve years ago, and with the exception of the \$100 spoken of in the contract itself, the defendants have paid nothing for the goods actually received by them. We think the amount of the damages allowed to the defendants by the jury was supported by some evidence, and that the resulting verdict which they have agreed upon in favor of the plaintiffs ought not to be disturbed.

The judgment appealed from should, therefore, be affirmed.

All concur.

Judgment affirmed. _____

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FRANCISCO ROCA et al., Respondents, v. ANNA D. BYRNE, as Executrix, etc., Impleaded, etc., Appellants.

A principal is entitled in all cases to re-claim his property intrusted to his agent, or the avails thereof if it has been converted into money, where he can trace the property or its avails, whether in the hands of the agent, his representative or a third person.

Where, therefore, the principal is able to trace a remittance of bills of exchange sent to his agent for the purpose of putting the latter in funds

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to meet expenditures and liabilities incurred by him, and the remittance is in excess of what was needed to discharge the principal's indebtedness in account with the agent, and where the principal is able to distinguish with absolute certainty the moneys deposited in bank as such avails, he is entitled to recover the same ; and this, although the avails were deposited to the credit of the agent's private account.

B., in his lifetime, was the agent in the city of New York for plaintiffs, who were carrying on business in Ecuador. Plaintiffs consigned merchandise to B. for sale, the proceeds being credited to their account. B. purchased goods for plaintiffs, which were paid for out of the avails of such sales, or by bills of exchange drawn on plaintiffs; they also drew bills on B., which he accepted, paid and charged to their account. The accounts were settled semi-annually. B. kept his bank account with defendant, the C. E. Bank, to the credit of which his own moneys as well as those belonging to plaintiffs were deposited. Prior to his death he himself, and, after such death, persons claiming to act for his estate, received from plaintiffs bills of exchange, the avails of which were deposited to said account. B. died insolvent. In an action brought to compel said bank to pay from the balance standing to the credit of B. in said bank account, which balance it appeared was wholly derived from the avails of said bills of exchange, a balance due plaintiffs on their account with B., *held*, that while as between plaintiffs and B. the relation of debtor and creditor existed according as the accounts showed a balance due to the one or the other, this did not affect the fact that the relation was of a fiduciary character ; that the avails of the bills in excess of what was due B. belonged to plaintiffs, and they had the right in equity to follow them ; that the fact that such avails were deposited to the credit of B.'s account did not affect the question as to whom they belonged ; and that plaintiffs were entitled to the relief sought.

Reported below, 68 Hun, 502.

(Argued February 6, 1895 ; decided February 26, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made April 14, 1893, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The action is brought against the executrix of Daniel Byrne, deceased, and the Corn Exchange Bank, to obtain a judgment directing the latter to pay to the plaintiffs certain moneys standing to the credit of the deceased ; claimed by them to be the proceeds of certain drafts transmitted to the deceased as

their agent and to have been received by him in such fiduciary capacity. The following were the facts: The plaintiffs were co-partners, carrying on business, under the firm name of Roca & Henriques, at Guayaquil, Ecuador. In February, 1888, Daniel Byrne became their agent in New York city and continued as such, until his death on August 2d, 1891. The plaintiffs were accustomed to consign merchandise to Byrne for sale, the proceeds of which were credited to the account of the principals. Byrne also purchased goods at the city of New York for, and shipped them to the plaintiffs, which were paid for by the avails of goods consigned to and sold by Byrne, and by bills of exchange sent to him by the plaintiffs. The plaintiffs were also accustomed to draw bills on Byrne, which he accepted, paid and charged to their account, and interest was charged on the balances against whichever party happened to be the debtor. Every six months the account was settled. On June 30, 1891, a settlement was had of all unsettled matters, and a balance of \$24,953.63 was found to be due to Byrne. Six bills, amounting to \$9,721.58, drawn by plaintiffs, accepted by Byrne and charged in the account of June 30th, fell due after that date, but were not paid by Byrne, and were thereafter paid by the plaintiffs, which reduced their indebtedness to him to \$15,232.05. Between June 20th and August 1, 1891, the plaintiffs sent Byrne nine bills drawn on various persons and firms amounting to \$18,313.69, which he and his representative received and collected, so that the balance due from his estate when this action was begun was \$3,081.64. During the period covered by the transactions involved in this litigation, Byrne kept an account with the Corn Exchange Bank, to the credit of which all his own money, as well as the avails of merchandise and bills of exchange received from the plaintiffs, were deposited, and against which he drew for his own account and benefit, and also in conducting the business of the plaintiffs. On July 25, 1891, Byrne received from the plaintiffs two bills of exchange amounting to \$2,774.26, which on that day he deposited in said bank to the credit of his account. On July 30, 1891, he received from plaintiff a bill of

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exchange for \$2,000, which on the same day he deposited in said bank to his credit. On August 2, 1891, Byrne died insolvent. On August 5, 1891, some person claiming to act for the estate of Byrne received from the plaintiffs a bill of exchange for \$440, the avails of which, amounting to \$439.63, were on the same day deposited to the credit of said account in said bank, and on August 31, 1891, some person claiming to act for the estate of Byrne received from the plaintiffs a bill of exchange for \$600, the avails of which were on the same day deposited to the credit of said account in said bank. The bills described, aggregating \$5,313.89, were four of the nine bills which aggregated \$18,313.69. When the action was commenced the balance of \$4,514.05, in the defendant bank to the credit of the deceased, or of his estate, was derived from the four above-mentioned bills of exchange. The plaintiffs had judgment in their favor at the Special Term; which was affirmed on appeal to the General Term; and the defendant appeals to this court.

Theron G. Strong for appellant. The proceeds of the drafts in question were not impressed with a trust in favor of the plaintiffs, but were in reality a part payment on running account of a balance due from plaintiffs to Byrne. (*Cowperthwaite v. Sheffield*, 3 N. Y. 243; *People v. M. & M. Bank*, 78 id. 269.) The course of dealing between the plaintiffs and Daniel Byrne, and the instructions given by the plaintiffs as to the disposition of the proceeds of the drafts in question, show conclusively that the relation of debtor and creditor only existed between them as to said moneys, and that the same were not impressed with a trust. (*E. N. Bank v. F. N. Bank*, 46 N. Y. 82; *Butler v. Sprague*, 66 id. 392; *Goodrich v. Dunbar*, 17 Barb. 644; *Bussing v. Thompson*, 15 How. Pr. 97; *Duguid v. Edwards*, 50 Barb. 288; *Baker v. N. Y. N. E. Bank*, 100 N. Y. 31.)

Michael H. Cardozo for respondents. The relation between the parties was the fiduciary one of principal and

agent, and the plaintiffs having traced the proceeds of their drafts into the agent's bank account, they were entitled to the amount due them. (*Moffat v. Fulton*, 132 N. Y. 507.) When an agent receives money or property from his principal, they may be reclaimed as between the parties, and before other persons have in good faith acquired rights in them, so long as the money or the avails of the property can be traced. (*Newton v. Porter*, 69 N. Y. 133; *Van Alen v. A. N. Bank*, 52 id. 1; *Cavin v. Gleason*, 105 id. 256; *Holmes v. Gilman*, 138 id. 369; *N. Bank v. Ins. Co.*, 104 U. S. 54; *U. S. Y. N. Bank v. Gillespie*, 137 id. 411.) If Byrne had lived he would, under the authorities, have been liable to arrest for a failure to pay over the proceeds of plaintiffs' drafts. (*Wallace v. Castle*, 14 Hun, 106; *Duguid v. Edwards*, 50 Barb. 288; *Moore v. Hillabrand*, 37 Hun, 491.)

GRAY, J. This is a somewhat peculiar case upon its facts and the question is whether the plaintiffs, having traced the avails of the drafts, which they had remitted to their agent, shall have them, as against the claims of other creditors upon the insolvent estate of Byrne. The general and well-recognized rule is, and has been, that a principal is entitled, in all cases, when he can trace his property, whether it be in the hands of the agent, or of his representatives, or of third persons, to reclaim it and it is immaterial that it may have been converted into money; so only that it is in condition to be distinguished from the other property or assets of the agent. (Story on Agency, § 231; *Thompson v. Perkins*, 3 Mason, 232; *Robson v. Wilson*, 1 Marshall Ins. 295; *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *Importers', etc., Bank v. Peters*, 123 id. 272.) The difficulty, here supposed to prevent the application of the general rule, arises in the nature of the course of dealing adopted; which, as it is argued on behalf of the appellant, shows that the relation of debtor and creditor, only, existed between the plaintiffs and their deceased agent. The moneys, it is insisted, proceeding from the drafts remitted to Byrne, were not

impressed with any trust; but were in part payment on account of a balance due from the plaintiffs. It is undoubtedly true that the relation of debtor and creditor existed, according as the state of the accounts showed the balance to be one way or the other; but that fact was not inconsistent with, and could not affect, the fact that the relation was also of a fiduciary character. Byrne received all drafts in virtue of his agency and they, or the proceeds, were received for purposes connected with that agency. It was not necessary that they should have been remitted against any specific obligations. They may have been remitted generally and generally credited in the account; but their purpose was to discharge obligations incurred, or to be incurred, or disbursements made, by their agent for them. What was the evident, the indisputable fact here? Plainly, that there resulted an excess, over what was incumbent upon the plaintiffs to pay, of a sum of money, which was not Byrne's; but which belonged to the plaintiffs. This excess being unused, or not required for the purpose for which remitted, how could Byrne, or his representatives, claim it, in equity? The legal title to the moneys may have been in him; but the right, in equity, to follow them, as the proceeds of their drafts, was in the plaintiffs. If Byrne, or his representatives, placed the moneys in the bank to the credit of his account, that would not affect the question as to whom they belonged beneficially; a question which equity, in a proper case, will always inquire into. If received, as here, in the course of transactions between the principal and the agent, the character of the moneys would be unchanged by the deposit; provided they could be identified. They would still be moneys held for the principal. However peculiar the circumstances here, from the particular course of dealing, the cardinal fact stands out, that the plaintiffs' property was sent to their agent, as such, and for purposes comprehended within the agency. The case cannot be likened to that of bills sent on general account between a merchant and his correspondent; nor to the case of the deposit of bills on a general running account with a banker and without specific

appropriation to other bills. It is more like the case supposed by Lord Chancellor COTTENHAM, in his opinion in *Jombart v. Woollett* (2 Myl. & Cr. 390), who, stating the result of the law as laid down in some cases cited, said: "Unless there be a contract to the contrary, if a person, having an agent elsewhere, remits to him, for a particular purpose, bills not due, and that purpose is not answered, and then the agent carries them to account, and becomes a bankrupt, the property in the bills is not altered, but remains in the party making the remittance." In *Veil v. Administrators of Mitchel* (4 Wash. C. C. 105), the plaintiffs sent the defendant's intestate two bills of exchange, with instructions to remit the proceeds. The intestate sold the bills; remitting a part of the proceeds of one; but keeping the rest and a post dated check which had been taken for the other. He died before the maturing of the check; which was collected by his administrators. On another account the plaintiffs were indebted to the intestate in a certain balance. The intestate died insolvent and the question reserved for the court was, whether the plaintiffs are entitled to recover the amount of the check and of the unremitted portion of the proceeds of the other note, after deducting what was due upon another account to the intestate. Mr. Justice WASHINGTON rendered judgment for the plaintiffs, upon the principle that, "where the principal can trace his property into the hands of his agent or factor * * * he may follow it, either into the hands of the factor, or of his legal representatives, or of his assigns, if he should become insolvent or a bankrupt."

If it be objected that the proof here is that the bills were not remitted for a particular purpose; but generally on account of all obligations incurred and disbursements made by Byrne on account of plaintiffs, I think that is not a substantial distinction. The remittances were, in fact, to an agent for a purpose within the scope of the agency and to meet the obligations or expenditures incurred for the remitters by the agent. I think, within the stipulated facts, the purpose of the remittance may be regarded as a particular one. We might paraphrase it as a general remittance for the particular purpose

of furnishing moneys to the agent, to cover the obligations and liabilities incurred by him as such.

If the business relations between the plaintiffs and Byrne had been of the character of such which ordinarily exist between merchants and their correspondents, there would be no case; but it is because Byrne was the plaintiffs' agent, that property, received by him for them, became impressed with a trust character and, if not disposed of, in good faith, to others, and if distinguishable from the agent's property, could be re-claimed by the principal, as against the general creditors of the agent. I am unable to see that, in truth, the nature of the dealings between the parties, of which so much has been made, necessarily did deprive their relations of their fiduciary character. The manner of his keeping the account, or of stating half-yearly balances, and the general nature of a remittance to him upon account, are facts, which need not have changed and, in my opinion, did not change the fiduciary nature of the relation held by Byrne to the plaintiffs. Under the conceded facts of the case, whatever he did, he did as their agent. The duties enumerated as devolving upon and performed by him were all consistent with his acting therein as agent.

In the account of June 30th, 1891, showing a balance against the plaintiffs of \$24,953.63, was included \$9,721.58 of acceptances by Byrne, maturing after that date and which were not paid by him, but which were eventually paid and taken up by the plaintiffs. The plaintiffs' indebtedness to him was, therefore, only \$15,232.05. The drafts remitted by plaintiffs between June 20th, 1891, and August 1st, 1891, and realized upon and credited to Byrne's account in the bank, amounted to \$18,313.69. There was, therefore, an excess over the amount necessary to discharge the indebtedness to the agent of \$3,081.64. Can it be said that these moneys did not, in equity, belong to the plaintiffs? I cannot see it otherwise than in that light. I think it is a very plain case, where the principal has been able to trace a remittance of bills, made for the purpose of putting his agent in funds to meet expendi-

tures and liabilities incurred on his account and in excess of what was needed to discharge their indebtedness in account, and where it has been possible to distinguish the moneys in bank as the avails of those bills with absolute certainty. That the proceeds of plaintiffs' drafts did not, by being deposited to the credit of Byrne's bank account, lose their character, is indisputable. In *Van Alen v. The Bank*, (*supra*), the money sought to be recovered was mingled with some of the agent's own money; but this was deemed of no consequence. The controlling fact was that the plaintiffs' moneys were in the bank. In that case the authority of the *Etna Bank* case, (46 N. Y. 82), was not deemed in point; inasmuch as there was no question of title in the plaintiff; but, merely, of the discharge by the defendant bank of an obligation to a depositor.

I think the affirmance by the General Term was correct and that the judgment should be affirmed, with costs.

All concur.

Judgment affirmed. _____

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167 314

BRIDGET KEENAN et al., as Administratrix, etc., Appellants,
v. THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD
COMPANY, Respondent.

A servant who sustains an injury from the negligence of a superior agent engaged in the same general business, cannot maintain an action against the common employer, although he was under the control of the agent and could not guard against his negligence.

In an action to recover damages for alleged negligence causing the death of K., plaintiffs' intestate, it appeared that the latter was a car repairer in defendant's employ. In the repair yard where K. was employed were two tracks exclusively for repairing cars, and another track for cars needing repairs, upon which track cars were shunted at all hours of the day. The repairing tracks were protected by flags when men were at work under the cars, but no such precaution was taken on the third track, as no repairing was done thereon. A large number of men were employed in the yard, who were divided into gangs. K. was engaged in repairing a car on one of the repair tracks; needing a bumper spring, and, not being able to obtain it of one of the employees of defendant, whose duty it was to furnish repairing materials, or to find one in the yard, he

reported the fact to T., his gang boss, who directed him to go to said third track and take a spring from a car thereon. While engaged under said car in removing the spring some other cars were backed on the track, moving that under which K. was at work, and he was injured. There was no evidence that it was T.'s duty to furnish materials required by those working under him. *Held*, that defendant was not liable; that T., when he gave the direction, was in no legal sense the representative of defendant, but merely a fellow-servant of K., for whose negligence it was not liable.

(Argued February 7, 1895; decided February 26, 1895.)

APPEAL from order of the General Term of the Superior Court of Buffalo, made February 1, 1894, which reversed a judgment in favor of plaintiffs entered upon a verdict and affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

The action was brought by John Keenan, the present plaintiff's intestate, who died after the date of the entry of judgment, and the present plaintiff was substituted.

George W. Cothran for appellants. Tracy, in giving the direction to Keenan to go down on track No. 8 and get a spring for use in repairing the car he was at work on represented the defendant. In giving that order he discharged a duty which the law required the master to perform and the latter is liable. (*Laning v. N. Y. C. R. R. Co.*, 49 N. Y. 521; *Hofnagle v. N. Y. C. R. R. Co.*, 55 id. 610; *Howd v. M. C. R. R. Co.*, 50 Miss. 178-192; *Benzing v. Steinway*, 101 N. Y. 552; *Corcoran v. Holbrook*, 59 id. 517-520; *Pantzar v. T. F. I. M. Co.*, 99 id. 368.) It was the master's duty to protect the servant. (*McGovern v. C. V. R. R. Co.*, 123 N. Y. 280; *Abel v. D. & H. C. Co.*, 128 id. 662; *Lafrano v. N. Y., etc., W. Co.*, 29 N. Y. S. R. 557; 130 N. Y. 658; *Buckley v. P. H. I. O. Co.*, 117 id. 645; *N. P. R. R. Co. v. Herbert*, 116 U. S. 642-648; *Hough v. R. Co.*, 100 id. 213-217; *Dobbins v. Brown*, 119 N. Y. 188; *W. R. Co. v. McDaniels*, 107 U. S. 454; *DeGraff v. N. Y. C. & H. R. R. R. Co.*, 76 N. Y. 130; *Goodrich v. N. Y. C. & H. R.*

R. R. Co., 116 id. 402; *P. Co. v. O'Shaughnessy*, 122 Ind. 588; *Goodfellow v. B. R. R. Co.*, 106 Mass. 461; *Quirk v. Holt*, 99 id. 164; *Marsh v. S. P., etc., R. Co.*, 32 Minn. 208; *Taylor v. E., etc., R. R. Co.*, 121 Ind. 124; *C., etc., R. R. Co. v. Lang*, 118 id. 579; *Coombs v. N. B., etc., Co.*, 102 Mass. 572; *Haley v. Case*, 142 id. 316; *Crowley v. B., etc., R. Co.*, 65 Iowa, 658; *Abel v. President, etc.*, 103 N. Y. 581.) The master cannot delegate any one of the duties imposed upon him by law to a servant of any grade so as to exonerate himself from responsibility to another servant who has been injured by its non-performance. (*Pantzar v. T. F. I. M. Co.*, 99 N. Y. 368; *Bushby v. N. Y., L. E. & W. R. R. Co.*, 107 id. 374; *Benzing v. Steinway*, 101 id. 547; *Fuller v. Jewett*, 80 id. 46; *Nichols v. B. & D. M. Co.*, 53 Hun, 138; 117 N. Y. 646; *Hankins v. N. Y., L. E. & W. R. R. Co.*, 142 id. 416; *Bernardi v. N. Y. C. R. R. Co.*, 60 N. Y. S. R. 789; *Crispin v. Babbitt*, 81 N. Y. 516-521; *Corcoran v. Holbrook*, 59 id. 517; *Loughlin v. State*, 105 id. 162, 163; *McGovern v. C. V. R. R. Co.*, 123 id. 280; *Flike v. B. & A. R. R. Co.*, 53 id. 549-553; *McCosker v. L. I. R. R. Co.*, 84 id. 77.) Keenan, when he was engaged in the performance of the duty enjoined upon him by the order of Tracy, had a right to understand and assume that the defendant, as master, had exercised, and would exercise, care and diligence in protecting him from injury, from a cause which the exercise of proper care and prudence on the part of the master would have seen and guarded him against. (*Kain v. Smith*, 89 N. Y. 375; *Connolly v. Poillon*, 41 Barb. 336; 41 N. Y. 619; *Jetter v. N. Y. & H. R. Co.*, 2 Abb. Ct. App. Dec. 458; *Ellis v. N. Y., L. E. & W. R. Co.*, 95 N. Y. 547; *Marsh v. Chickering*, 101 id. 399; *Hough v. R. Co.*, 100 U. S. 217; *F. W., etc., R. Co. v. Gildersleeve*, 33 Mich. 133; *Noyes v. Smith*, 28 Vt. 59-64; 24 N. Y. 414; *Lorey v. Hall*, 8 N. Y. S. R. 799; *Powers v. N. Y., L. E. & W. R. R. Co.*, 98 N. Y. 280; *R. R. Co. v. Fort*, 17 Wall. 558; *Ford v. F. R. R. Co.*, 110 Mass. 260; *N. P. R. R. Co. v. Herbert*, 116 U. S. 642.) Tracy, in giving the order, was dis-

charging a duty which the law imposed upon the defendant, and in the performance of such duty he was the defendant. (*Booth v. B. & A. R. R. Co.*, 73 N. Y. 38; *Flike v. B. & A. R. R. Co.*, 53 id. 549; *Sprong v. B. & A. R. R. Co.*, 58 id. 58, 59; *Dana v. N. Y. C. & H. R. R. R. Co.*, 92 id. 639; *Crayzer v. Taylor*, 10 Gray, 274; *Ellis v. N. Y., L. E. & W. R. R. Co.*, 95 N. Y. 546; *Stringham v. Stewart*, 100 id. 516; *Cone v. D., L. & W. R. R. Co.*, 81 id. 206; *Fuller v. Jewett*, 80 id. 46; *O'Laughlin v. N. Y. C. & H. R. R. R. Co.*, 113 id. 623; *Benzing v. Steinway*, 101 id. 547; *Nary v. N. Y., O. & W. R. R. Co.*, 125 id. 759; *Keegan v. W. R. R. Co.*, 8 id. 175; *Griffin v. B. & A. R. R. Co.*, 148 Mass. 133, 145; *Franklin v. W. & S. P. R. R. Co.*, 37 Minn. 409; *Crutchfield v. E. & D. R. R. Co.*, 76 N. C. 320; *Lilly v. N. Y. C. & H. R. R. R. Co.*, 107 N. Y. 556.)

Adelbert Moot for respondent. As Tracy and his men were co-employees, no cause of action is established by the evidence. A verdict should have been directed for the defendant, and the General Term properly ordered a new trial upon the exceptions. (*Crispin v. Babbitt*, 81 N. Y. 522; *Murphy v. B. & A. R. R. Co.*, 88 id. 146; *Hussey v. Cogger*, 112 id. 616; *Slater v. Jewett*, 85 id. 61; *Weber v. Piper*, 109 id. 496; *Rose v. B., etc., R. R. Co.*, 58 id. 217; *Newbauer v. N. Y., L. E. & W. R. R. Co.*, 101 id. 607; *Wright v. N. Y. C. R. R. Co.*, 25 id. 562; *Brick v. R. R. R. Co.*, 98 id. 211; *McCosker v. L. I. R. R. Co.*, 84 id. 77; *N. P. R. R. Co. v. Hambly*, 154 U. S. 349; *Crown v. Orr*, 140 N. Y. 450; *Murphy v. N. Y. C. R. R. Co.*, 11 Daly, 122; *Moeller v. Brewster*, 131 N. Y. 606; *White v. W. L. Co.*, Id. 631; *Marsh v. Chickering*, 101 id. 396; *Dorr v. L. V. R. R. Co.*, 158 Penn. St. 364.)

BARTLETT, J. The plaintiff's intestate, who was a car repairer, brought this action to recover damages for personal injuries received by him while working in defendant's repair yard in Buffalo.

The jury rendered a verdict in his favor for \$10,000, and the General Term of the Superior Court of Buffalo reversed the judgment on questions of law, ordering a new trial, and the intestate's administratrix (he having died after verdict rendered) appeals to this court giving the usual stipulation for judgment absolute in case of affirmance.

The facts in this case are simple and will be assumed as stated by the intestate for the purposes of this appeal.

There were three tracks running east and west at the place in the repair yard where deceased was working on the day of the accident; the southerly track was No. 21; the middle track, No. 2; the north track, No. 8. It is undisputed that the only entrance to these tracks was from the east; that No. 21 and No. 2 were used exclusively for repairing cars, and No. 8 was known as the "cripple track," on which were placed cars needing repairs; that the repairing tracks were protected by flags when men were at work under the cars, but no such precaution was adopted on track No. 8, as no repairing was done there, and cars were shunted thereon at all hours of the day.

The deceased testified: "I was working right next to track No. 8 and within a short distance for three months, and saw cars on that track every day and the way they did business there."

From five hundred and fifty to nine hundred men were employed in the repair yards, and one Robert Gunn was foreman in charge of the repairs of cars; O'Day was assistant foreman and Getz was the man who distributed the various articles of hardware such as bumper springs, braces, etc., to the men when at work.

The men were divided up into small gangs and one Tracy was foreman or gang boss of the gang in which the intestate worked.

On the day of the accident the intestate and another man were at work repairing a car on track No. 2, and found they needed an eight-inch bumper spring; the intestate applied to Getz for the spring and was informed that he did not have one; he then went to what was known as the scrap pile,

which contained second-hand material of all kinds, and failed to find the required article there; he then reported these facts to the gang boss, Tracy, who told him he had better go down to No. 8 track and take one from a car there; in company with his fellow-workman intestate followed out this suggestion, and while under a car on track No. 8, in the act of removing a bumper spring, some cars were backed in on that track, moving the car under which intestate was working, and inflicting upon him very serious and permanent injuries.

The only legal question in this case is, did the gang boss, Tracy, in suggesting to the intestate to go down on track No. 8 and get the spring, represent the defendant?

It is admitted by the learned counsel for the appellant that there is no direct evidence in the case showing that it was any part of Tracy's duty to furnish materials required by the workmen under him, but he insists that the defendant having failed to designate any one person whose duty it should be to borrow springs from other cars for temporary use, and still continuing the business of car repairing, it not only acquiesced in the gang foremen procuring such materials, but impliedly authorized them to procure them wherever they could.

The appellant's counsel also admits that Tracy was the fellow-servant of the intestate in everything except in the performance of a duty which the law imposed upon the defendant, viz., procuring materials for use.

We are unable to adopt these views.

It would lead to the establishment of an exceedingly unsafe rule to hold that a gang boss over forty or fifty men could, without direct authority from the company, change the safe and proper rules in pursuance of which the work in the repair yards was conducted, and direct workmen to prosecute their labors under cars standing on tracks other than the regular, duly protected repair tracks.

Tracy was in no legal sense the representative of the defendant when he suggested to the intestate that he should procure a spring from a car standing on track No. 8; he was a fellow-servant making a very unwise and dangerous suggestion.

A servant who sustains an injury from the negligence of a superior agent, engaged in the same general business, cannot maintain an action against their common employer, although he was subject to the control of such superior agent, and could not guard against his negligence or its consequences. (*Sherman v. Rochester & Syracuse R. R. Co.*, 17 N. Y. 153; *Loughlin v. State of New York*, 105 id. 159.)

The order appealed from should be affirmed and judgment absolute directed for the defendant, with costs.

All concur.

Ordered accordingly.

MARGARET E. THOMPSON, as Administratrix, etc., Respondent,
v. BUFFALO RAILWAY COMPANY, Appellant.

A minor, although not supposed to possess the judgment, caution and prudence of a person of mature years, is, unless shown not to be *sui juris*, expected and required to exercise the measure of care and caution that is common and usual in one of the same age.

While persons have the right to cross a street on which a street railroad is operated at any place they may select, and are not confined to the street crossing, yet the railroad cars have the preference between the crossings, and although the cars must be managed with care so as not to injure persons in the street, yet pedestrians must use reasonable care to keep out of their way.

A., a girl fourteen years of age, was playing with companions in a city street in front of her residence, through which street ran defendant's road, an electric double-track street railway. She started across the street, but stopped until a car running west on the nearest track had passed, and then started to run across in the rear of the car without pausing to see if a car was approaching on the other track. As she reached the other track she was struck and killed by a car going east thereon. In an action to recover damages it appeared that the day before the accident defendant had changed its motor power from horses to electricity, and that the cars were running at a higher rate of speed than sanctioned by the city ordinances. A. was familiar with defendant's tracks, cars and their mode of operation. *Held* (O'BRIEN, J., dissenting), that A. was chargeable with contributory negligence; and so, that the action was not maintainable.

(Argued February 7, 1895; decided February 26, 1895.)

145 196
75 AD 558

145 196
77 AD 164

APPEAL from judgment of the General Term of the Superior Court of Buffalo, entered upon an order made July 2, 1894, which overruled defendant's exceptions and directed judgment in favor of plaintiff upon verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

Porter Norton for appellant. The court erred in denying plaintiff's motion for a new trial. (*Tucker v. N. Y. C. & H. R. R. R. Co.*, 124 N. Y. 317, 318; *Wendel v. N. Y. C. & H. R. R. R. Co.*, 91 id. 420; *Weston v. City of Troy*, 139 id. 281; *Baker v. E. A. R. R. Co.*, 62 Hun, 39; *Fenton v. S. A. R. R. Co.*, 126 N. Y. 625; *Davenport v. B. S. R. R. Co.*, 100 id. 632; *Reich v. U. R. Co.*, 78 Hun, 417; *McLane v. B. C. R. R. Co.*, 116 N. Y. 459.) There was no evidence showing any fault or negligence on the part of the defendant. (*Francisco v. T. & L. R. R. Co.*, 78 Hun, 14; *Alexander v. R. C. & B. R. R. Co.*, 128 N. Y. 13; *Donnelly v. B. C. R. R. Co.*, 109 id. 21; *Stone v. D. D., E. B. & B. R. Co.*, 59 id. 456.) There were errors in the admission of evidence. (*Francisco v. T. & L. R. R. Co.*, 78 Hun, 13.)

George W. Cothran for respondent. The court properly refused to grant a non-suit. (*Ernst v. H. R. R. Co.*, 35 N. Y. 9; *Palmer v. N. Y. C. & H. R. R. R. Co.*, 112 id. 243-245; *Kellogg v. N. Y. C. & H. R. R. R. Co.*, 79 id. 72; *Swift v. S. I. R. R. Co.*, 123 id. 646; *Johnson v. H. R. R. R. Co.*, 20 id. 65; *Galvin v. Mayor, etc.*, 112 id. 223, 228; *O'Neil v. N. Y., O. & W. R. Co.*, 115 id. 579; *Hill v. N. A. R. R. Co.*, 109 id. 239; *McGrath v. N. Y. C. & H. R. R. R. Co.*, 63 id. 523; *Knupfle v. K. I. Co.*, 84 id. 488; *Massoth v. D. & H. C. Co.*, 64 id. 531, 532; *Wasmer v. D. & L. R. R. Co.*, 80 id. 212; *Briggs v. N. Y. C. R. R. Co.*, 72 id. 26; *Oldenburg v. N. Y. C. & H. R. R. R. Co.*, 124 id. 414; *Jetter v. N. Y. & H. R. R. Co.*, 2 Abb. Ct. App. Dec. 456.) Deceased was not negligent. (*Huerzeler v. C. C. T. R. R. Co.*, 139 N. Y. 490; *Bevy v. N. Y. C. & H. R.*

R. R. Co., 92 id. 295; *Swift v. S. I. R. R. Co.*, 123 id. 646; *McClain v. B. C. R. R. Co.*, 116 id. 464; *Fenton v. S. A. R. R. Co.*, 126 id. 625; *Rottenberg v. Segelke*, 6 Misc. Rep. 3; *Murphy v. Orr*, 96 N. Y. 14; *Moskovitz v. Lighte*, 68 Hun, 102; *Birkett v. K. I. Co.*, 110 N. Y. 504; *Bernhard v. R. R. Co.*, 68 Hun, 369; *Moebus v. Herrmann*, 108 N. Y. 349.) In a public street, a person has a right to cross at any point that suits his convenience, no matter how many cars are in the street, or where the point is. (*Moebus v. Herrmann*, 108 N. Y. 349; *Smedis v. B., etc., R. R. Co.*, 88 id. 14; *McClain v. B. C. R. R. Co.*, 116 id. 460-469; *Brusso v. City of Buffalo*, 90 id. 679; *Fleckenstein v. D. D., etc., R. R. Co.*, 105 id. 655.)

HAIGHT, J. This action was brought to recover damages for the alleged negligently killing of plaintiff's intestate. Alcy, the deceased, was a daughter of the plaintiff, fourteen years of age, large for her years, and had been to school for two years.

The defendant was engaged in operating an electric double-track street railway in Broadway in the city of Buffalo.

On the 26th day of May, 1893, between 8 and 9 o'clock in the evening, Alcy with six other girls were engaged in playing "I spy" on Broadway, nearly in front of her residence, between Warner and Rother avenues. Alcy was on the northerly side of Broadway and started to run across to the southerly side. As she approached the northerly track of the defendant's road a car from the east going west passed. She stopped until the car was by and then started to run across the street in the rear of the car, and, as she reached the southerly track, she was struck by one of defendant's cars going east on that track and killed.

Upon the trial evidence was given on behalf of the plaintiff tending to show that the defendant's car upon the southerly track was proceeding at a higher rate of speed than was sanctioned by the ordinances of the city, and that no gong was sounded announcing its approach.

The only question which we are called upon to consider relates to the contributory negligence of the deceased. This question is presented by motions for non-suit, for a direction of a verdict, and by a request that the court charge the jury "that if the girl passed immediately behind the west-bound car, without stopping to look in both directions to ascertain if a car was approaching, that the plaintiff cannot recover," all of which were refused and exceptions taken.

Although a minor, no claim is made that Alecy was not *sui juris*. Whilst she may not have possessed the judgment, caution and prudence of persons of more mature years, she was expected and required to exercise the measure of care and caution that is common and usual in one of her age. She was familiar with the defendant's tracks, cars, and their mode of operation. It is true that the day before the defendant had changed its motor power from horses to electricity, but we are unable to discover how she was misled or deceived by this change. Whilst persons have the right to cross streets at any place they may select, and are not confined to street crossings, street railway cars between such crossings have a preference, and, while they must be managed with care so as not to injure persons in the street, pedestrians must, nevertheless, use reasonable care to keep out of their way. (*Fenton v. 2d Ave. R. R. Co.*, 126 N. Y. 625.)

In *Baker v. 8th Ave. R. R. Co.* (62 Hun, 39) a child eight years of age passed behind a car going in one direction on to the other track, and was struck by the horses of another car going in the opposite direction, and it was held in the first department that there could be no recovery.

In *Reich v. Union R. Co.* (78 Hun, 417) a boy was playing in the street with some comrades in the evening. It was pleasant, but dark. His comrades started to chase him. He ran behind a car going north, crossing the avenue diagonally, tending toward the south, and when he stepped upon the south-bound track was struck by a south-bound car and killed. It was held that a non-suit was proper.

In *Scott v. Third Ave. R. R. Co.* (41 N. Y. St. Repr. 152)

the plaintiff and her husband were attempting to cross 125th street in the city of New York, upon which cable cars are operated, about half-past nine o'clock in the evening. They approached the track and stopped for a car to pass going west. As soon as the car cleared the crosswalk they proceeded to cross, and, upon stepping upon the south track, were struck by an east-bound car. A judgment in favor of the plaintiff was reversed.

In *Tucker v. N. Y. C. & H. R. R. Co.* (124 N. Y. 308) a boy twelve years old was killed by one of the defendant's locomotives when attempting to cross its tracks. The day was windy and it was snowing, but not enough to obstruct the view. The street upon which he was traveling was crossed by four of defendant's tracks. He stopped in the center of one of the tracks facing in the direction of the locomotive, which was backing down at a high rate of speed. If he had looked he could have seen the approaching engine. From the point where he stood to the center of the track, where he was struck and killed, the distance was fourteen feet. After changing a bag he was carrying from one shoulder to the other, he started on without again looking in the direction of the engine. It was held that he was guilty of contributory negligence. (See *Wendell v. N. Y. C. & H. R. R. Co.*, 91 N. Y. 420; *Reynolds* case, 58 id. 248; *Davenport v. Brooklyn City R. R. Co.*, 100 id. 632.)

Such is the trend of the authorities, and applying the rule repeatedly asserted in this court to the facts under consideration, we can discover no theory upon which this judgment can be sustained. The deceased knew of the danger, and of the necessity to keep a lookout for passing cars, and yet evidently interested and excited by her game dashed suddenly across the street in the rear of a passing car without pausing to look or observe the approaching car upon the other track.

It is said that she may have been deceived in reference to the approaching car by reason of its speed, but she could not have been deceived unless she saw it. Had she seen it approaching before the other car passed, she would hardly have

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been justified in attempting to cross the street after the first car had passed without again looking for the approaching car.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

All concur, except O'BRIEN, J., dissenting.

Judgment reversed.

KATE A. SCAGGS, as Administratrix, etc., Respondent, v. THE PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE AND HUDSON CANAL COMPANY, Appellant.

A person passing along a street over a railroad crossing, guarded by gates which are raised, is bound to be vigilant upon that part of the highway the same as upon any other.

While the open gate is an affirmation of safety from the danger of any passing train, this does not dispense with the necessity of vigilance the same as is required of one traveling on a highway where there is no crossing.

In an action to recover damages for the death of D., plaintiff's intestate, alleged to have been caused by defendant's negligence, these facts appeared: Defendant's road crosses a village street at a point near its station. The road at the crossing has five tracks. There are gates at the crossing to prevent entrance upon the tracks when trains are passing. D., plaintiff's intestate, stopped on the street, when the gates were down, waiting to pass when they were raised. A locomotive attached to a train stopping at the depot projected about twelve feet upon the highway; steam was escaping through the automatic or mechanical device for that purpose, making the usual noise. A horse and wagon was on the street, waiting for the gates to be raised; the driver was having much difficulty in controlling the horse. The gatetender raised the gate sufficiently to allow D. to go through, and after she passed the locomotive raised the gate so that the horse and wagon could pass. D., after passing the locomotive, started to go diagonally across the street; the driver of the horse, finding himself unable to control him, hallooed twice to her; she paid no attention, but walked on, and when between the third and fourth track the horse struck her, causing her death. *Held*, that the evidence failed to show negligence on defendant's part; and so, that plaintiff was properly non-suited.

Scaggs v. Pres., etc. (74 Hun, 198), reversed.

Borst v. L. S. & M. S. R. Co. (4 Hun, 346), distinguished.

(Argued February 8, 1895; decided February 26, 1895.)

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APPEAL from order of the General Term of the Supreme Court in the third judicial department, made December 6, 1893, which reversed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Circuit and ordered a new trial.

The plaintiff brought this action to recover damages from the defendant for causing the death of her intestate. The accident occurred at the Division street crossing of the defendant's railroad, in the village of Saratoga Springs. Division street crosses the defendant's tracks east and west, at a point immediately south of the railroad station. The street crossing at this point is about forty feet in width and planked. Between the east and west sides of the railroad enclosure are five tracks. Gates existed, which shut off the entrance upon the tracks, and which were raised and lowered by the gateman, as occasion demanded. On the morning in question, a locomotive, attached to a train of cars, was standing on the easterly one of the five tracks, alongside of the station, waiting to go south and it projected from twelve to thirteen feet upon the highway crossing. The locomotive was making the usual noises, which accompany the escape of steam through the automatic or mechanical device for that purpose. The intestate was standing by the gatetender on Division street, on the easterly side of the crossing; waiting to pass when the gates were raised. A man named Priester, who was driving a horse to a lumber wagon, was also waiting for the gates to be raised and was experiencing much difficulty in controlling the movements of his horse. He was the principal witness for the plaintiff in the case and he narrated the occurrence as follows: "The train was there before I came to the crossing. When I came there the gates were down. I stopped my horse. They were letting off steam. The gates were down and the gates went up to let this woman through. When the woman got by the cowcatcher, he," (meaning Bentley, the gatetender), "raised the gates and my horse went on. * * * My horse was restless and uneasy. * * * I was trying to manage it. * * * He raised the

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gates for the woman to go through ; high enough so she could go through without stooping her head. * * * The gate remained in that position until she got by the cowcatcher ; then when they went clear up, the horse started. After the gates were up and when my horse was on the first track, I hallooed twice to the woman and when the horse struck the first track the man and I got hold of the lines. We could not hold the horse and we struck the woman. * * * When my horse got on the track, the steam went up straight. It commenced popping off just as I got my horse on the track. When the engine commenced popping off my horse shied on one side." Again he testified : " When my horse started from a point thirty or forty feet east of the first track, this woman was then in front of the cowcatcher, going across the track. That was when my horse started. When my horse got to the first track she was off that track. The engine was on the first track. There are four or five tracks. When my horse reached the first easterly track this woman was between the first and second tracks on the west side. There were two more tracks between the engine and the woman. I went over three tracks before I struck the woman. The woman was between the third and fourth tracks, counting from the east, when the horse struck her. She was walking diagonally across the highway, so that her back and side were towards me and she continued to walk, from the time I first saw her until she was struck, in that direction. * * * She was between the third and fourth tracks at the time she was actually struck. * * * The woman at the time was in the highway where the wagons go. * * * She was going towards the southwest side of the track ; the lower side of the crossing ; that is, the south side, when she was struck. When my horse struck the first track, I hollered twice to the woman as loud as I could holler. She was then ahead of me a track and a half or two tracks." Again he testified : " When I hollered to the woman, she did not pay any attention, but walked on in the same direction right across." A by-stander, called as a witness on behalf of the plaintiff, testified with regard to what took place

when the intestate was about to cross, as follows: "I stood there a little while and Bentley raised the gate and I looked and saw when he raised it that this lady passed through. I think it stopped when she went under and Bentley looked around towards the horse and raised the gate higher and then the horse went through and that is the last I saw of the woman, as she went around the end of the engine. That is the last I saw of the woman or the horse."

At the close of the plaintiff's case, the trial justice ordered a non-suit; holding, in effect, that the defendant had not been shown to be negligent and that whatever hazard there was in the intestate's crossing, the railroad company did nothing that increased the hazard. The plaintiff appealed to the General Term, where the judgment of non-suit was reversed, by a divided court, and a new trial was ordered. The defendant thereupon appealed to this court; giving the usual stipulation for judgment absolute in case of the affirmance of the order.

Lewis E. Carr for appellant. The non-suit was properly granted, because the evidence did not justify a finding of any negligent act or acts of the defendant that were proximate factors in causing the death for which the action was brought. (*Dobbins v. Brown*, 119 N. Y. 188; *McCaffery v. R. R. Co.*, 47 Hun, 404; *Young v. R. R. Co.*, 107 N. Y. 500; *Palmer v. R. R. Co.*, 112 id. 234; *Rodrian v. R. R. Co.*, 125 id. 526; *Oldenburgh v. R. R. Co.*, 124 id. 414; *Unger v. R. R. Co.*, 51 id. 497; *Sutton v. R. R. Co.*, 66 id. 243; *Burke v. Witherbee*, 98 id. 562.) The non-suit was properly granted because the horse and wagon were the producing cause of the misfortune and there was here, in that, and in the acts of the deceased, a new intervening element that breaks the connection between the acts of the defendant and the accident, so that the defendant is not chargeable with the consequences remotely flowing from what it did. (*Day v. Crossman*, 1 Hun, 570; *Cary v. R. R. Co.*, 23 Barb. 643; *Mars v. D. & H. C. Co.*, 54 Hun, 625; *Kerrigan v. Hart*, 40 id. 389; *Read v. Nichols*, 118 N. Y. 224; *Jex v. Straus*, 122 id. 293.) The

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non-suit was properly granted, because the only inference that could fairly be drawn from the evidence as to the acts of the deceased was that of failure on her part to exercise such care and caution as she was bound to exercise. (*Rodrian Case*, 125 N. Y. 526; *Tolman Case*, 98 id. 198; *Moebus v. Hermann*, 108 id. 349; *Barker v. Savage*, 45 id. 191.)

James W. Verbeck for respondent. Negligence is not always predicated upon a single elementary act or omission, but may be the result of a combination of two or more acts, innocent and harmless in themselves, separately. (43 N. Y. 569.) A railroad company has no right to block a public highway with an engine, and a gatetender or flagman has no right to mislead the public to their injury. (*Borst v. L. S. & M. S. R. Co.*, 60 N. Y. 639; *Palmer v. N. Y. C. & H. R. R. Co.*, 112 id. 234; *Congdon v. D. & H. C. Co.*, 15 Wkly. Dig. 24; *Stinson v. N. Y. C. R. R. Co.*, 32 N. Y. 333, 338; *Newson v. N. Y. C. R. R. Co.*, 29 id. 383, 390; *Busch v. Buffalo C. R. R. Co.*, 29 Hun, 112; *Feeney v. L. I. R. R. Co.*, 116 N. Y. 375.) Where an injury to one is caused by and is the natural and probable result of the wrongful act or omission of another, such other is liable therefor, although other causes, put in motion by the act or omission, and which, in the absence thereof, would not have produced the result, contribute to the injury. (*Gibney v. State*, 137 N. Y. 1; *Pollet v. Long*, 56 id. 200; *Lowery v. M. R. Co.*, 99 id. 158-166; *Smith v. B. & N. A. R. M. S. P. Co.*, 86 id. 408; *Guille v. Swan*, 19 Johns. 381; *Munger v. Baker*, 65 Barb. 539; *Billman v. I. C. & L. F. R. Co.*, 76 Ind. 166; *Lee v. U. R. Co.*, 12 R. I. 383; *Chicago, etc., R. Co. v. Dickson*, 63 Ill. 151; *Barrett v. T. A. R. R. Co.*, 45 N. Y. 628; *Chapman v. N. H. R. R. Co.*, 19 id. 341; *Webster v. H. R. R. Co.*, 38 id. 260; *Colegrove v. N. Y. & H. R. R. Co.*, 20 id. 492; *Sheridan v. B., etc., R. R. Co.*, 36 id. 39; *Phillips v. N. Y. C. & H. R. R. R. Co.*, 127 id. 657; *Ring v. City of Cohoes*, 77 id. 83; *Robinson v. N. Y. C. & H. R. R. R. Co.*, 66 id. 11; *Dyer v. E. R. Co.*, 71 id. 228; *Masterson v. N. Y.*

C. & H. R. R. Co., 84 id. 247.) The learned judge who non-suited the plaintiff says: "The woman was not injured by the railroad company; she was run down by a runaway horse." This, the plaintiff claims, is error, and insists that she was injured by the horse through the negligence of the defendant, and that whether the driver of the horse was negligent or not makes no difference. (4 Hun, 346; 66 N. Y. 639.)

GRAY, J. Upon the evidence which the plaintiff adduced in support of her complaint, that the death of her intestate was caused by the negligence of the defendant, I think that she was properly non-suited. The facts very clearly showed that there was nothing done, or omitted to be done, on the part of the defendant to charge it with negligence; unless it be with reference to the act of Bentley, the gatetender, or with reference to the locomotive and train of cars standing by the station. If we consider, in the first place, what was done by the gatetender, we see him acting in the exercise of his judgment, in letting the deceased first pass under the gate to cross the railroad tracks. He was probably observant of the restless and unmanageable conduct of Priester's horse and, therefore, did not at the time raise the gate high enough to let the horse and wagon also through. But when the woman had passed by the cowcatcher of the engine, which was standing partly upon the street crossing, he then, and not till then, allowed the horse and wagon also to pass through the gates. The gatetender's conduct was not influenced by any fear of danger from passing trains; but, evidently enough, by a desire to prevent an accident to the woman from the restless horse. Obviously, when the woman had got by the engine, that danger would, in the ordinary exercise of human judgment, cease; and that would have been the fact here, if, after passing the engine, she had kept either upon her side of the street crossing, or, if she wanted to cross the street, she had first looked to see if any danger was imminent. But she did not do this. Instead of keeping to the north side of the crossing, after passing the engine, she crossed diagonally over

the highway and with so little regard to what she was doing, as to pay no attention to Priester's horse, although he halloosed to her twice. It is clear from the evidence that at the time when she was struck, she was so far beyond the gates she had entered and the railroad train standing on the east track, as to have been able to remain in, or to reach, a place of safety. I think, under such circumstances, it is impossible to predicate any negligence upon what the gatetender did. He was not bound to do more than to take reasonable precautions against the occurrence of accidents to those passing over the highway through the railroad enclosure. Whatever peril existed, whether from the presence of the locomotive, or from the restive horse, was quite as obvious to the deceased as to the gatetender and, if we may assume that he committed any error, it was at most an error of judgment for which the defendant could not be made liable.

Nor was the deceased freed from the obligation to be herself vigilant, when making use of the highway crossing. She was as much bound to be vigilant in the use of her senses upon that part of the highway, as upon any other part. The open gate, through which she was permitted to enter by the gateman, was an affirmation of safety from the danger of any passing train. It did not dispense with the necessity of her being as vigilant, when upon the crossing in the railroad enclosure, as upon the ordinary highway. (*Palmer v. Railroad Co.*, 112 N. Y. 234; *Rodrian v. Railroad Co.*, 125 id. 526.) I am, therefore, unable to discover wherein the defendant may be deemed to have been in any wise negligent and responsible for what occurred to the deceased, because of any act of commission or omission on the part of the gatetender.

Considering, in the next place, the situation of the train at the station, waiting to go south with its load of passengers; what was there in that fact upon which negligence in the defendant can be predicated? In the opinions of the two General Term justices, who concurred in the ordering of a new trial, "the very position of this engine in the public highway, and the occupation and blocking up of said highway

by it, was of itself an act of negligence." This extraordinary view they based, or rather felt constrained to take, upon the authority of *Borst v. Railroad Co.* (4 Hun, 346). In that case the locomotive and train were in the public highway and the plaintiff's horse, while passing along the street, was frightened and shied, so as to run against a wagon and throw out and injure the plaintiff. In that case, the plaintiff claimed that the steam from the defendant's engine blew out more, while he was crossing the track, than it did when he was signaled by the flagman to do so; and the question which the General Term passed upon was the correctness of the refusal of the trial justice to charge, "that if the jury should find that there was any additional noise coming from the engine, after the plaintiff started to cross the track, that unless that increase of noise was caused by the negligence of the defendant or its servants, the defendant was not liable therefor in this action, although such noise frightened plaintiff's horse, and contributed to this injury." It seems that the trial justice explained, in refusing the request, that when the flagman beckoned the passenger, who was waiting in the highway, to cross the track, he had "a right to suppose that no change will take place in anything under the control of the railroad company, likely to increase the danger." This explanation was deemed to be sufficiently correct and the General Term said: "If more steam was emitted from the engine while he was passing than before, that was an unfair surprise to the plaintiff, and if it contributed to the injury, it was the fault of the defendant's agents, for which the defendant was responsible." That is by no means this case. In the first place, we are not informed from the record in that case whether the escape of steam was, as here, the necessary result of a mechanical device upon the locomotive; and, in the next place, there was a sudden increase of the noise from escaping steam at the time the plaintiff passed. In the present case, there was no change in the conditions, which existed while Priester was waiting to pass through the gates and the conditions which existed when he passed the locomotive.

The escape of steam was from an automatic safety valve, which, when the engine is standing, prevents the dangerous accumulation of steam, by letting it off when the pressure reaches a certain point. It cannot, of course, be pretended that the use of such a device, adopted for protection from danger and which acts mechanically and not under the control of the engineer, is negligence. Another distinction between the *Borst* case and the present one, not altogether unimportant to be noticed, is that the recovery there was sought for by a party who was injured by the frightening of his horse and was based upon, as I have before mentioned, a change of conditions from the time when the flagman invited him to cross the tracks and the time when, passing the engine, there was a sudden increase of noise.

Nor can it reasonably be said that the position of the locomotive in the public highway was an act of negligence, which renders this defendant responsible for what happened here. The position of the locomotive had nothing whatever to do with the accident to the woman. She was some distance beyond the locomotive and in a place of perfect safety, as to any danger from a passing vehicle, if she had chosen to look out for its approach. Whether the locomotive stood upon the highway to any extent was a circumstance, which had no possible connection with what happened to the woman. If Priester's horse was so frightened by the escaping steam as to get beyond his control, precisely the same result would have happened if the engine had been fifty or more feet back from where it was. Either we must say that the woman should not have been allowed to pass through the gates, while Priester was waiting to pass with his restive horse, which would be absurd; or we must say that the gate tender, out of an individual consideration of the facts under his observation, used his best judgment, when he allowed the woman to pass under the gates first and then, seeing her beyond the projecting locomotive and, presumably, in a place of safety, raised the gates higher for Priester to pass through with his horse and wagon.

Without further discussion of the case, I am of the opinion that the plaintiff was properly non-suited. The facts in evidence, as they group themselves in the mind, make it clear that the plaintiff's intestate received the injuries, from which she died, by reason of an occurrence, for which the defendant is not in anywise responsible, viz.: the breaking away of Priester's horse from his control. Priester had a perfect right to pass over the crossing. There was no train passing, or expected to pass, at the time; and the deceased, in crossing diagonally over the highway, without apparently looking about her, assumed all the hazards.

The order of the General Term should be reversed and the judgment of the Circuit Court affirmed, with costs.

All concur.

Order reversed and judgment affirmed.

HOWARD J. ANSTETH, an Infant, etc., Respondent, v. BUFFALO RAILWAY COMPANY, Appellant.

Plaintiff, a boy ten years of age, who was stealing a ride on one of defendant's street railroad cars, stood, as he testified, upon the step of the front platform, holding to the handles upon the dashboard and on car. The conductor came out upon the platform, with one hand reached out toward plaintiff (he, as a witness, indicating the manner), and cried "hey." Plaintiff, frightened, let go of the handle on the dashboard and fell from the step in such a manner that the wheels of the car passed over one of his legs. In an action to recover damages a motion for a non-suit was denied, and a verdict rendered for plaintiff. *Held*, that it might be assumed, in aid of the judgment, that the act of the conductor was of such a nature as to justify the plaintiff in believing that he was about to receive punishment or bodily harm; and so, that this court could not interfere.

(Argued February 8, 1895; decided February 26, 1895.)

APPEAL from judgment of the General Term of the Superior Court of Buffalo, entered upon an order made July 2, 1894, which affirmed a judgment in favor of plaintiff

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entered upon a verdict and also affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Porter Norton for appellant. The court erred in not directing a non-suit in this action at the close of plaintiff's case; in any event, it should have directed a verdict in compliance with the defendant's motion at the close of defendant's case. The plaintiff failed to maintain his case by a preponderance of proof. (*Hale v. Smith*, 78 N. Y. 480; *Baulec v. N. Y. C. & H. R. R. Co.*, 39 id. 356; *Powers v. N. Y. C. & H. R. R. Co.*, 60 Hun, 19; 128 N. Y. 659; *Wilds v. H. R. R. Co.*, 24 id. 430-433; *Ernst v. H. R. R. Co.*, 39 id. 61; *Reynolds v. N. Y. C. & H. R. R. Co.*, 58 id. 248; *Pizley v. T. A. R. R. Co.*, 1 J. & S. 407.) The circumstances of the case clearly show that the alleged acts of defendant's conductor were not solely the cause of plaintiff's injuries. (*Tucker v. N. Y. C. & H. R. R. Co.*, 124 N. Y. 317; *Friess v. N. Y. C. & H. R. R. Co.*, 67 Hun, 216; *Hogan v. C. P., N. & E. R. R. Co.* 124 N. Y. 647; *Kaare v. T. S. & I. Co.*, 139 id. 369.) A non-suit should have been granted. (*Coleman v. S. A. R. Co.*, 114 N. Y. 612; *Conly v. K. I. Co.*, Id. 108; *Clark v. E. A. R. Co.*, 36 id. 136; *Cordell v. N. Y. C. & H. R. R. Co.*, 75 id. 332; *Reynolds v. N. Y. C. & H. R. R. Co.*, 58 id. 248.) The verdict should be set aside, because illegal evidence was admitted, which was done against the objection of the defendant. (*Anderson v. R., W. & O. R. R. Co.*, 54 N. Y. 334; *Albertis v. N. Y., L. E. & W. R. R. Co.*, 118 id. 77; *Hutchins v. Hutchins*, 98 id. 57.)

Adolph Rebadow for respondent. The court properly submitted to the jury the question as to whether or not the defendant, through the act of its conductor, caused plaintiff's injury. (*Bagley v. Bowe*, 105 N. Y. 171; *Ernst v. H. R. B. Co.*, 35 id. 9; *Wolfkiel v. S. A. R. R. Co.*, 38 id. 49;

Sewell v. City of Cohoes, 75 id. 53; *Payne v. T. & B. R. R. Co.*, 83 id. 574; *Casey v. N. Y. C. R. R. Co.*, 78 id. 518; *Hart v. H. B. Co.*, 80 id. 622; *Hume v. York*, 47 id. 639; *Baulec v. N. Y. C. R. R. Co.*, 59 id. 356.) The General Term having affirmed the judgment of the trial term, the court upon this appeal is limited in its examination to the question whether there is any evidence to sustain the verdict. (*Kaare v. T. S. & I. Co.*, 139 N. Y. 369; *People ex rel. v. French*, 92 id. 306; Code Civ. Pro. § 1337; *Kingsland v. Murray*, 133 N. Y. 170; *Bossout v. R. W. & O. R. R. Co.*, 131 id. 37; *Dwight v. G. L. Ins. Co.*, 103 id. 358; *People v. Lee*, 1 Wh. Cr. Cas. 364.) The question of contributory negligence was for the jury. (*McGovern v. R. R. Co.*, 67 N. Y. 417; *O'Mara v. R. R. Co.*, 38 id. 445; *Barry v. R. R. Co.*, 92 id. 290; *Shaw v. Jewett*, 86 id. 617; *Clark v. R. R. Co.*, 49 Hun, 605.) The jury having found as a matter of fact that plaintiff's injuries were occasioned solely through the acts of the conductor, committed in the business of the master, and within the general scope of his employment, the defendant's liability became fixed. (*Jackson v. S. A. R. R. Co.*, 47 N. Y. 274; *Hoffman v. R. R. Co.*, 87 id. 25; *Cohen v. R. R. Co.*, 69 id. 173; *Schultz v. R. R. Co.*, 89 id. 243; *Day v. B. C. R. R. Co.*, 12 Hun, 435; 76 N. Y. 593; *Higgins v. W. T. Co.*, 46 id. 23; Addison on Torts, 23; Smith on Mast. & Serv. 151; Story on Equity, 452; *Clark v. R. R. Co.*, 40 Hun, 605; 133 N. Y. 670; *McCann v. S. A. R. R. Co.*, 117 id. 505; *Rounds v. R. R. Co.*, 44 id. 129.) The verdict is not excessive, and should not be set aside upon that ground or reduced. (*Coleman v. Southwick*, 8 Johns. 51; *Minick v. City of Troy*, 19 Hun, 253; *Lyons v. R. R. Co.*, 57 N. Y. 490; *Dyke v. R. R. Co.*, 45 id. 113; *Wallace v. V. O. Co.*, 128 id. 579.)

HAIGHT, J. This action was brought to recover damages for injuries sustained by the plaintiff in alighting from one of defendant's street railroad cars on Plymouth avenue in the city of Buffalo on the 21st day of October, 1892.

The plaintiff was a boy ten years of age, and was at the time of the accident stealing a ride upon one of the defendant's cars. He stood, as he testified, upon the step of the front platform with one hand upon the handle of the dashboard and the other upon the handle on the corner of the car. While standing in this position the conductor passed through the car out upon the front platform, and with one hand reached out toward him (the witness indicating) and cried, "Hey!" At this he let go of the handle upon the dashboard, fell from the step, and his body swung around against the side of the car, he still holding to the handle upon the corner and in that position remained whilst the car proceeded ten or fifteen feet. He then dropped, falling by the side of the car in such a manner that the wheels passed over one of his legs.

Upon the trial motions for non-suit and for direction of verdict were made and denied.

In *Clark v. N. Y., L. E. & W. R. R. Co.* (40 Hun, 605; affd., 113 N. Y. 670) the plaintiff was a boy of the age of thirteen years. He caught on to the forward end of the caboose of a moving freight train. One of the company's employees saw him and dashed a cup of water in his face, causing him to fall from the car in such a manner as to have his knee crushed by one of the wheels. It was held that he could recover.

In *McCann v. Sixth Ave. R. R. Co.* (117 N. Y. 505) a boy, in crossing the street, whereon were two tracks of the defendant's road, in order to get out of the way of a truck passing upon the street, jumped on to the rear platform of a car which had stopped at the crossing, and, as he was passing across the platform, the conductor kicked at him, and, to avoid the kick, he jumped from the car, landing in the other track, without looking, and was struck by a car moving upon that track. It was held that a non-suit was improper.

In *Hogan v. Central Park, N. & E. River R. R. Co.* (124 N. Y. 647) a boy twelve years of age, was stealing a ride upon the rear platform of one of the defendant's cars, which

was managed by the driver alone. A number of boys had jumped on to the car for the purpose of stealing a ride, but at the command of the driver they all got off except the decedent, who continued to sit upon the left side of the rear platform. As the car crossed Second avenue another lad jumped on to the right side of the platform, for the purpose of obtaining a free ride, and thereupon the driver started towards the rear platform for the purpose of compelling the boys to leave the car, but before he reached them they jumped off, the plaintiff's intestate on the left side of the car, and in doing so fell under one of the defendant's cars running on the other track and was killed. The driver did not let go of his lines, with which he managed his horses, nor approach within several feet of the boys, nor threaten them with violence. It was held that the judgment in favor of the plaintiff should be reversed.

The plaintiff was a trespasser, and the defendant owed him no duty of protection. Its servants had the right to remove him from the car, but in doing so were required to subject him to no unnecessary hazard. They had no right to seize him and throw him from the car whilst it was in motion, or to so violently assault or frighten him as to cause him to fall from the car. In order to justify a recovery the act of the defendant's servant must have been improper, unnecessarily dangerous, the proximate cause of the injury, and done for the purpose of removing the plaintiff from the car.

As we have seen, the conductor went out upon the front platform, extended his hand toward the plaintiff, and cried out "Hey!" The boy tells us that it frightened him and that he fell off. The record does not give us much information with reference to the character of the act, whether it was violent or threatening. It does give us to understand that the witnesses indicated to the jury, by illustrating with the arm, the manner and character of the act. We consequently may assume, in aid of the judgment, that the act was of such a nature as to justify the plaintiff in believing that he was about to receive punishment or bodily injury.

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The case may be close and upon the border, but we incline to the view that we cannot interfere.

The judgment should be affirmed, with costs.

All concur, except ANDREWS, Ch. J., and GRAY, J., dissenting.

Judgment affirmed.

ELLIS H. ROBERTS & Co., Appellants, v. JOHN BUCKLEY et al.,
Impleaded, etc., Respondents.

An assignment for the benefit of creditors must be interpreted like other instruments, according to the intent of the parties, and if possible such a construction given it as will sustain rather than defeat it.

The *onus* is upon the party charging fraud in such an instrument to show affirmatively some illegal provision, or some act consciously and purposely done which is inconsistent with an honest purpose.

A direction in the assignment for the payment of a debt at a greater amount than is justly due, will not invalidate the assignment in the absence of a fraudulent intent.

When the instrument is assailed as fraudulent because it provides for the payment of a fictitious debt, it must appear that the assignor, with a fraudulent purpose in view, knowingly and consciously directed the payment of a claim which to his knowledge had no existence, either in whole or in some substantial part.

The question as to the validity of an assignment is to be determined by the facts existing at the time it was made, and, if when delivered it represented an honest purpose and was made in good faith, fraud cannot be fastened upon it thereafter by any act or statement, whether verbal or written, of the assignor.

While the rule that a person is presumed to intend the natural and necessary consequences of his acts; and so, where he acts voluntarily, and the act necessarily operates to defraud others, that he intended the fraud, this is not a conclusive presumption, but may be removed by evidence that the act was the result of mistake or inadvertence, and that the intention was innocent.

An assignment for the benefit of creditors preferred and directed the assignee to pay in full certain debts enumerated in a schedule annexed, with interest. In the schedule M. was named as a creditor. In a column headed "Form of debt" was this statement "account and notes which assignors are unable to describe." The amount was stated to be "about \$12,000." In a column headed "Date for interest," were specified six items, with different dates attached, amounting in all to \$12,000; then followed this statement, "as near as assignors are able to state."

Twenty days after the assignment was made the assignors filed the inventory and schedules required by the statute (§ 3, chap. 466, Laws of 1877). In these the amount of the debt to M., the several items thereof, with the dates attached, were given, as stated in the assignment, but without any qualifying words. In an action to set aside the assignment because of alleged fraud, various items of indebtedness to M., consisting of notes and checks, were produced and proved, and the referee found that the assignors were indebted to him thereon at the date of the assignment in the sum of \$12,656.88. It appeared that one item of \$1,500 named in the schedule, had been paid and was inserted by mistake; also, that the obligations produced differed in dates and amounts, in some cases slightly, in others materially, from the dates and amounts stated in the schedule. These facts also appeared and were found by the referee: When the assignment was made M. was in the west, in the service of the government. The firm of attorneys who drew the assignment obtained the data relating to the debt in question from M.'s attorneys. The assignment was then drawn and presented by a member of said firm to the assignors for examination; they were unable to describe the debt with accuracy; some of the books upon which it appeared were not in their possession, and some portion of it was for moneys paid by M. to third parties for the benefit of the assignors, and thereupon the qualifying words were inserted in the schedule. The other member of said firm, who drew the assignment, and who had not been informed of the change made, drew the inventory from the same data used by him in drawing the assignment, without inserting the qualifying words; he intending in both papers to describe the same debt and in the same way. The referee found that the assignors verifying the inventory intended to set forth the indebtedness without stating the precise items and without intending to modify or change the statement contained in the assignment, and acted in good faith without any intent to hinder, delay or defraud creditors. *Held*, that the preference and so the assignment were properly adjudged to be valid; that the preferred creditors had the right to prove any honest debts to the extent of about \$12,000, irrespective of the amounts and dates given in the schedule; and that the variance shown was immaterial.

Roberts v. Vietor (130 N. Y. 585), distinguished.

On the same day the assignment was recorded a judgment in an action brought by M. against the assignors was entered upon an offer of judgment. The judgment was in excess of the real indebtedness by over \$800. The complaint asked relief against this judgment. The referee found that that amount was excessive but not fraudulent, and that it was rendered in good faith, for the purpose of securing an honest debt. The judgment was subsequently, on application to the court, modified and reduced to the true amount. *Held*, that the court had power to so correct the judgment; also, that even if it had not been corrected, it was good for the sum actually due.

After a former trial in this action and a reversal on appeal of the judgment rendered therein in favor of the contesting creditors, the County Court made an order amending the inventory *nunc pro tunc*, so as to conform substantially to the statement of the debt in the assignment. *Held*, that the County Court had power to make the order, and when made it was as much part of the assignment as the inventory which it modified, and as the referee found that it could not operate, as against the contesting creditors, to impair or prejudice any rights or liens which they had acquired against assigned property prior to the entry of the order, the creditors were protected and without any legal or just ground for complaint.

Reported below, 80 Hun, 58.

(Argued January 30, 1895; decided March 5, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made July 10, 1894, which affirmed a judgment in favor of defendants entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

George F. Danforth and *James Dunne* for appellants. The former decision of this court should have been treated by the court below as a final adjudication of the invalidity of the assignment. (130 N. Y. 597.) Nor is the case changed to the advantage of the defendants by the additional or new evidence given on the second trial. (*Taylor v. Ranney*, 4 Hill, 619; *McCormick v. Wheeler*, 11 S. & R. 114; 119 U. S. 589-601; *Porter v. Williams*, 94 N. Y. 142.) Neither was the oral evidence competent. (Laws of 1887, chap. 466, § 3.) The evidence in explanation or to show a "mistake" in the assignment or schedules is inadmissible under the pleadings. (130 N. Y. 585.) The judgment of March 18, 1886, in favor of D. G. Major against Buckley and Shirley should be vacated and set aside as fraudulent and void as against *Vietor & Achelis*. (130 N. Y. 601; *Dexter v. Irvine*, 133 id. 551; *Smith v. Mayor, etc.*, 37 id. 518; 116 id. 410; *Simons v. Goldback*, 123 id. 637; *Burch v. Newbury*, 10 id. 396; *Dash*

v. *Kleek*, 7 Johns. 490.) If a court of equity has the power to disturb, in favor of one creditor, a lien acquired by another creditor by legal proceedings upon either a fund or property, it does not exercise it. It leaves the question of preference to be settled by the legal rule. (*Bank of Rochester v. Emerson*, 10 Paige, 359; *De Peyster v. Hildreth*, 2 Barb. Ch. 109; *Buchan v. Sumner*, Id. 165; *Burchard v. Phillips*, 11 Paige, 66; *Sutherland v. Bradner*, 39 Hun, 134; 116 N. Y. 410; *Knight v. Bunn*, 7 Ired. 77; 8 Ired. Eq. 82; *Jones' Eq. [N. C.] 24*; *Simons v. Goldback*, 123 N. Y. 637.) The assignment is valid against every one save Viotor & Achelis, for they only attacked it. (54 Hun, 461, 462.) By the appeal of Viotor & Achelis, only so much of the judgment was taken to the Court of Appeals as aggrieved Viotor & Achelis. And although the language of the remittitur is broader, it should be understood as meaning the judgment so far as it affects Viotor & Achelis, who by adverse proceedings had acquired a lien. (*Morris v. Sickly*, 137 N. Y. 604; 118 id. 415; 130 id. 601.)

H. J. Cookinham for respondent Bulger. The general assignment of Buckley & Co. to Patrick F. Bulger as assignee for the benefit of creditors is a good and valid assignment. (*Griffin v. Marquardt*, 21 N. Y. 121; *Bank of Silver Creek v. Talcott*, 22 Barb. 550; *Brainerd v. Dunning*, 30 N. Y. 211; *Maack v. Maack*, 49 Hun, 507; *Richardson v. Thurbur*, 104 N. Y. 606; *Roberts v. Viotor*, 54 Hun, 461, 465; *Smith v. Smith*, 136 N. Y. 313.) The sum of \$12,656.38 was a just and valid debt due Daniel G. Major at the date of the assignment. (*Flack v. Vil. of Green Island*, 122 N. Y. 107, 117; *People v. French*, 123 id. 636; *Healey v. Clark*, 120 id. 642.) The amount actually due Major was preferred by the statement of the preference in the assignment. (Laws of 1887, chap. 466, § 3; *Hendricks v. Waldon*, 17 Johns. 438; *Griffin v. Marquardt*, 21 N. Y. 121; *Bank of Silver Creek v. Talcott*, 22 Barb. 550; *Brainerd v. Dunning*, 30 N. Y. 211; *Maack v. Maack*, 49 Hun,

507; *Burley v. Hartson*, 40 id. 121; 109 N. Y. 656; *Richardson v. Thurber*, 104 id. 806.) The additional evidence produced on the last trial to explain the omission of certain qualifying words from the schedules filed subsequently to the assignment was sufficient, relevant and competent. (*Pratt v. Stephens*, 94 N. Y. 387; *Brown v. Halstead*, 17 Abb. [N. C.] 197; *Kavanagh v. Beckwith*, 44 Barb. 192; *Peyser v. Myers*, 135 N. Y. 599; *Van Bergen v. Lehmain*, 72 Hun, 304; *Shultz v. Hoagland*, 85 N. Y. 464, 473; *Crook v. Rindskopf*, 105 id. 476, 482; *Fay v. Grant*, 53 Hun, 44, 47; 126 N. Y. 624; *Blain v. Pool*, 13 N. Y. S. R. 571; 116 N. Y. 651.) The mere omission of certain qualifying words in the schedules filed subsequently to the assignment did not, *per se*, render the latter fraudulent. (*Wilson v. Forsyth*, 24 Barb. 105; *Mathews v. Poultney*, 33 id. 127; *Shultz v. Hoagland*, 85 N. Y. 464; *Talcott v. Hess*, 31 Hun, 282; *Chambers v. Smith*, 60 id. 248; *Browning v. Hart*, 6 Barb. 91; *Cuyler v. Cartney*, 40 N. Y. 221; *Peyser v. Myers*, 135 id. 599; *Stafford v. Merrill*, 62 Hun, 144, 147; *Coursey v. Morton*, 132 N. Y. 556; *Fay v. Grant*, 53 Hun, 44; *Smith v. Smith*, 136 N. Y. 313; *Nordlinger v. Anderson*, 123 id. 544; *Durant v. Pierson*, 124 id. 444; 58 Hun, 190; *Crook v. Rindskopf*, 105 N. Y. 476, 485; *Townsend v. Stearns*, 32 id. 209, 313; *Franey v. Smith*, 125 id. 44.) In the former decision of this case the Court of Appeals did not pass upon the issues as now presented. That decision is not conclusive upon this appeal. (130 N. Y. 596; Code Civ. Pro. § 1317; *Guernsey v. Miller*, 80 N. Y. 181.) The amendment of the schedules by order of the county judge was valid and binding upon all the parties to this action. (*In re Cohn*, 78 N. Y. 248; *In re Morgan*, 99 id. 145, 148; *In re Underhill*, 117 id. 471, 478; *Garlock v. Vandervort*, 128 id. 374; *Mitchell v. Van Buren*, 27 id. 300; *Ingram v. Robbins*, 33 id. 409-418; *U. Bank v. Bush*, 36 id. 631; *Symson v. Silheimer*, 40 Hun, 116; *Cook v. Whipple*, 55 N. Y. 150; *Nims v. Sabine*, 44 How. Pr. 252; *Taylor v. Ranney*, 4 Hill, 619; *Weeks v. Tomes*, 16 Hun, 349; *McCormick v. Wheeler*, 36 Ill. 114.) The assignment must

be sustained as to the moneys, debts and choses in action in the hands of the assignee at the time of the commencement of the suit. (*Castle v. Lewis*, 78 N. Y. 131; *Hess v. Hess*, 117 id. 306, 308; *McAllester v. Bailey*, 127 id. 583.) None of the appellants' exceptions were well taken. (Code Civ. Pro. § 992; *Daniels v. Smith*, 130 N. Y. 696; *Turner v. Weston*, 133 id. 650; *Healey v. Clark*, 120 id. 642; *West v. Van Tuyl*, 119 id. 620; *Patterson v. Robinson*, 116 id. 193; *Burger v. Burger*, 111 id. 523; *Crim v. Starkweather*, 136 id. 635; *Faxon v. Mason*, 76 Hun, 408.)

W. A. Matteson for judgment creditors, respondents. It is first submitted that the appellants, Viotor & Achilles, have no right or standing in this action to prosecute it against the defendants. (*Reubens v. Jewel*, 13 N. Y. 488; *Estes v. Wilcox*, 67 id. 264; *Addee v. Bigler*, 80 id. 349; *Litchenberg v. Cherdelfelder*, 33 Hun, 58; 103 N. Y. 302.) The debt claimed to be due to Daniel G. Major is a valid claim. The referee has found that it is an honest debt. (*Church v. Sparrow*, 5 Wend. 223; *Miller v. Manice*, 6 Hill, 115; *O. Co. Bank v. De Puy*, 17 Wend. 47; *O. Bank v. Hennessy*, 48 N. Y. 551.) The Major judgment is valid. (*Weaver v. Greenbaum*, 61 N. Y. 311; *Shultz v. Hoagland*, 85 id. 467; *W. Co. v. Hodenpyl*, 135 id. 430; *Kaare v. T. S. & I. Co.*, 139 id. 337; *Bear v. Mayor, etc.*, 96 id. 567; *Aldredge v. Aldredge*, 120 id. 614; *Devlin v. G. S. Bank*, 125 id. 756; *Barnard v. Gantz*, 140 id. 253; *Morris v. Talcott*, 96 id. 107; *Lorillard v. Clyde*, 86 id. 387; *Crook v. Rindskopf*, 105 id. 435; *Beardsley v. Wheeler*, 11 Hun, 539; *Trier v. Herman*, 44 id. 489; *Gutman v. McNulty*, 22 Wkly. Dig. 241; *Brown v. Halstead*, 17 Abb. [N. C.] 197; *Valentine v. McQue*, 26 Hun, 456; *Coffin v. Leslie*, 36 id. 348; 110 N. Y. 645; *Sears v. Burnham*, 17 id. 446; *Hunt v. Grant*, 19 Wend. 90; *U. Bank v. Bush*, 36 N. Y. 634; *Mitchell v. Van Buren*, 27 id. 300; *Ingram v. Robbins*, 33 id. 418; *Happock v. Donaldson*, 12 How. Pr. 142; *Mann v. Savage*, 7 id. 449; *White v. Bokhart*, 73 N. Y. 259; *Gere v. Gundlach*, 57 Barb. 15;

N. Y. Rep.]

Opinion of the Court, per O'BRIEN, J.

Stark v. Stark, 2 How. Pr. 362.) The judgment creditors whom we represent are also preferred creditors under the assignment. They are, therefore, interested in maintaining this action, and urge its validity. (130 N. Y. 592; *Shultz v. Hoagland*, 85 id. 467; *Townsend v. Stearns*, 32 id. 214; *Hardman v. Boyd*, 39 id. 197; *Peyser v. Meyers*, 135 id. 606; *Crook v. Rindskopf*, 105 id. 485; *N. Y. & B. F. Co. v. Moore*, 102 id. 667; *Morris v. Talcott*, 96 id. 107.)

O'BRIEN, J. The plaintiff, a domestic corporation and judgment creditor of the firm of John Buckley & Co., brought this action to set aside a general assignment made by the firm for the benefit of creditors, to the defendant Bulger, on the 17th of March, 1886. The complaint charges that it was made to hinder, delay and defraud creditors and is, therefore, fraudulent and void.

At the time the assignment was made, suits were pending against the firm in behalf of various creditors, in which judgments were rendered subsequent to the assignment, and executions levied upon the property in the hands of the assignee. The complaint stated that the action was brought, not only for the purpose of enforcing the judgment of the plaintiff and the lien obtained or claimed under the execution issued thereon, but also in behalf of all other creditors who were similarly situated and who desired to join in the prosecution of the action. The other creditors who had obtained judgments and claimed liens, acquired thereunder, were made defendants and, among them, the firm of Vietor & Achelis who had a large debt and claimed a lien by attachment, issued in an action for the recovery of the debt, in which an attachment had been granted and levied upon the property after the assignment. This firm, by answer, joined with the plaintiffs in assailing the assignment upon the allegations of fraud contained in the complaint, and the action finally assumed the form of a controversy between this firm and the assignee, both defendants, all the other creditors, including the plaintiffs, having practically abandoned the con-

test in regard to the validity of the assignment, though there has been no change in the parties or the form of the action.

On a former trial before a referee and a review at the General Term, the assignment was held to be free from fraud and entirely valid. The judgment, however, was reversed in the Second Division of this court and a new trial granted. (*Roberts v. Vietor*, 130 N. Y. 585.)

This appeal is from an affirmance of the judgment rendered on the second trial, before another referee, in which it was again decided upon a full trial that the assignment was valid and the charges of fraud not sustained.

These charges were originally aimed at claims preferred in the assignment, in favor of various of the creditors, with respect to which it was alleged that they had no existence in fact and were fictitious and fraudulent, and preferred in the assignment with a fraudulent intent and for a fraudulent purpose. In the progress of the litigation, which is of long standing, the charges against these preferred debts have all been abandoned except so far as they relate to the claim of a single creditor. The charge of fraud now rests entirely upon the facts and circumstances connected with the debt of Daniel G. Major, the brother-in-law of Buckley, one of the assignors, and whose claim was preferred in the third class. The complaint alleged that the debt so preferred was fictitious and fraudulent and so invalidating the whole assignment. This was the simple and well-defined issue before the referee on the last trial, and this appeal presents only questions resulting from the trial of that issue.

Whether the debt, which the assignors directed the assignee to pay to this creditor, was honest or merely fictitious and thus fraudulent, was the question and the only question in controversy. From the very nature of the issue the whole controversy turned upon a question of fact which is ordinarily capable of ready and easy solution in any mode of trial. The learned referee has determined this issue in favor of the assignment. He has found that the debt preferred in the assignment to this creditor was honest and free from all fraud, that

it was justly due to the creditor from the assignors, and that no part of it was fictitious. The consideration of the debt and all the facts and circumstances connected with its origin, creation and preference in the assignment, have been found with great fullness of detail against the contention of the creditors assailing the assignment. After such an issue has been twice tried and as often reviewed in an appellate court, having jurisdiction over questions of fact, it is seldom that any question is left demanding serious consideration in this court. But the judgment which was the result of the first trial was reversed, as we have seen, upon the former appeal, and the case has again been argued in this court by distinguished counsel who insist with great earnestness that the same result should follow this appeal. Moreover, the discussion among ourselves reveals the fact that some of my brethren are disposed to take that view of the case. These circumstances and this situation will perhaps justify a more extended discussion of the questions decided in the court below, and in the Second Division upon the former appeal, than would otherwise be thought necessary.

There is no dispute concerning the rules of law that govern in such a case, with respect to the construction to be given to the assignment and the inventory and schedules. They must be interpreted, like all other instruments, according to the intention of the parties and, if possible, such a construction should be adopted as will sustain the assignment, rather than defeat it, in accordance with that quaint rule given by Coke: "Whensoever the words of a deed may have a double intendment, and one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken." (Coke's Litt. 42.) The onus is upon the party charging fraud to show affirmatively some illegal provision or some act, consciously and purposely done, which is inconsistent with an honest purpose. A mistake in the inventory of the property or in the assignment, with respect to the description of the debt, or its amount or form, in the absence of actual fraud, will not invalidate the instrument. As was

said by Judge FINCH, in one of the cases cited below: "It would be hard to find any schedule absolutely perfect, or any debtor who could inventory every item of his property with strict accuracy. Room must be allowed for honest mistakes, and possibly even for careless and thoughtless error." When the instrument and the acts of the parties are fairly capable of a construction consistent with innocence and the general rules of law, they should be given that construction in preference to one which would impute a fraudulent intent or defeat the general intent and purpose of the conveyance. (*Townsend v. Stearns*, 32 N. Y. 209; *Shultz v. Hoagland*, 85 id. 467; *Bagley v. Bowe*, 105 id. 171; *Crook v. Rindskopf*, Id. 476.) Nor will a direction in the assignment for the payment of a debt at a greater amount than is justly due invalidate the instrument, in the absence of a fraudulent intent. In a recent case the debt was preferred for \$20,000 in excess of what was really due, and that excess paid to the creditor. We held that as there was no actual fraud the assignment was not avoided, but the assignee could simply recover back the excess paid. (*Peyser v. Myers*, 135 N. Y. 599.)

The assignment in this case was valid or invalid, fraudulent or honest at the moment it was made. When it was delivered the title to the property passed under it, if ever, and if at that time, it represented an honest purpose and was made in good faith, fraud could not be fastened upon it afterwards by any acts or statements of the assignors, whether verbal or written.

These acts and statements, at most, could amount to nothing more than evidence reflecting light with more or less force, according to their nature, upon the intent and purpose with which the assignment was made, and thus bearing upon the issue of fact between the parties. But the character of the instrument itself must be determined upon the facts and the situation existing when it was delivered and recorded. The assignment in question directed the assignee to pay in full certain debts enumerated in schedule C annexed, after having first paid and discharged in full, with interest, the two other

classes of preferred creditors described in the two preceding schedules. On turning to schedule C we there find the debt of Major, upon which the issue of fraud in this case turns, and which it is alleged is fictitious, described in these words:

NAME OF CREDITOR.	Residence.	Consideration.	Form of debt.	Amount.	Date for interest.
Daniel G. Major.	Washington, D. C.	Money loaned.	Account and notes which assignors are unable to describe.	About 12,000.	\$1,000, Jan. 12, 1888. 1,500, Aug. 8, 1888. 500, Oct. 4, 1888. 1,000, Feb. 4, 1884. 3,000, Feb. 10, 1884. 5,000, May 23, 1884. As near as assignors are able to state.

The assignee was thus directed, if anything remained after paying the debts of the two first classes of preferred creditors, then to pay the debt in question to Major, consisting of certain notes and accounts which the debtors were unable to describe, the aggregate of which was stated at about \$12,000, to be increased, however, by adding interest, to be computed from the dates and upon the amounts mentioned in the last column. They did not even profess to state these dates or amounts with accuracy since they added the qualifying words, "as near as assignors are able to state" in the column headed "date for interest." The debt preferred was a gross sum of about \$12,000, without professing to give the items, since the dates and amounts in the last column were nothing but mere data for computing interest.

The primary and controlling question in the case is whether the debt thus described, in fact existed, or was honestly due to the creditor, or was merely fictitious and fraudulent. All the other facts in the case are merely collateral to this, the main fact, and are of but little consequence except so far as they furnish matter of evidence bearing upon this central point of the whole controversy. The learned referee found upon abundant evidence that the debt existed and by full and comprehensive findings of fact negatived every allegation of fraud. He found that on the day the assignment was made,

the assignors honestly owed this preferred creditor \$12,656.38. The several obligations entering into the debt, as a whole, were produced before the referee and he has made an express finding as to each item. They consisted of six promissory notes and two checks of the following amounts and dates: Note Feb. 26, 1883, \$1,000; June 1, 1883, \$1,000; Oct. 4, 1883, \$500; January 31, 1884, \$1,000; Feb. 12, 1884, \$3,000; May 6, 1884, \$3,000; May 6, 1884, check, \$500; May 17, 1886, cash advanced, \$2,538.75. After computing interest on these amounts from the dates given and crediting payments, the balance is the debt found by the referee. These findings were made upon evidence that cannot even be said to be at all conflicting and there is not the slightest dispute as to the facts. The learned counsel for the contesting creditors made no suggestion in his oral or written argument against the existence of the debt in fact, as found at the trial, or as to the sufficiency of the words used in the assignment to authorize the payment. It appeared upon the trial that the \$1,500 item in the schedule had been paid and that it was inserted in the schedule by mistake and this fact is found upon evidence entirely satisfactory. So it also appeared and is found that when the several obligations were produced before the referee they differed in dates and amounts, in some cases slightly, and in others more materially, from the dates and amounts of the several items in the schedule. The reason for this variance was satisfactorily shown and is found by the referee. Moreover, the assignors did not profess to describe the items with accuracy as already observed. Certainly there is nothing in the variance between the items in the assignment and those in the referee's report, if indeed there can be said to be any variance at all, to impeach the assignment. (*Smith v. Smith*, 136 N. Y. 313; *Richardson v. Thurber*, 104 id. 606; *Pratt v. Stevens*, 94 id. 387.) It is so entirely obvious that the preferred creditor had the right to prove any honest debt that he had to the extent of about \$12,000, irrespective of the amounts and dates in the last column, that the variance, if any, is not of the slightest importance. To call the debt or

any part of it fictitious because made up of amounts with dates differing from those in the last column is a plain perversion of terms that is quite inconceivable.

The assignment has, thus far, been considered only as it existed when delivered and recorded, and as affected by the facts disclosed at the trial and found by the referee. It is quite clear that, thus considered, it was not invalidated by reason of anything appearing upon its face or any extraneous fact found at the trial. The learned counsel for the contesting creditors, up to this point, has not been able to find anything in the case to sustain his position, or which tends to show that at the time the assignment was made there lurked in it any element of fraud, and, consequently, his assault upon the instrument is based entirely on what occurred afterwards; and this brings us to that feature of the case which, thus far, has played an important part in this controversy.

On the 7th of April, twenty days after the assignment was made, the debtors filed the inventory and schedules required by the statute. (Laws of 1877, chap. 466, § 3.) They were verified by them two days before and contained the following statement with reference to the debt in question :

NAME.	Residence.	Amount.	Form.		
Daniel G. Major.	Washington, D. C.	\$12,000	Accounts and Notes.	Judgment.	Money Loaned.
			January 12, 1883, \$1,000.		
			August 8, 1883, \$1,500.		
			October 4, 1883, \$500.		
			February 1, 1884, \$1,000.		
			February 10, 1884, \$3,000.		
			May 23, 1884, \$5,000.		

The dates and amounts of the several items are identical with those in the assignment, but the qualifying words there found were omitted, and hence it is urged that it is an unqualified statement of the debt, which was untrue, for the reason

that it exceeds, by the sum of \$845.32, the true amount as found by the referee.

The direction of the debtors to the assignee was to pay the debt described in the schedule attached to the assignment, not, necessarily, to pay that described in another schedule not made until twenty days afterwards. The direction in the assignment was, as we have seen, to pay a debt consisting of a gross sum of about \$12,000, the items of which could not be specified, certain amounts and dates being given for the computation of interest. When the assignors came to make the inventory, twenty days afterwards, they did not and could not change this direction. If the last description of the debt differed from the first the assignee was not necessarily controlled by the latter. It might be evidence of a fraudulent intent when connected with other facts entitled to greater or less weight, according to the circumstances, but it could not, of itself, invalidate what was valid before. The assignee was not confined to the inventory for a description of the debt or for the amount directed to be paid. He could look beyond it and to the whole instrument, and, in any event, he could not be compelled to pay any more than should appear to be justly due. The administration of an estate conveyed to a trustee for the benefit of creditors devolves upon the County Court under the statute, and ample provision is there made for the examination and determination of all claims against the estate by that court and by a jury, upon the application of the assignee or any creditor. If the debt was magnified in the inventory beyond its true amount, that would not, necessarily, make it fictitious unless it was fictitious when the assignment was made. Before we can condemn an instrument as fraudulent because it provides for the payment of a fictitious debt it must appear that the assignor has, with a fraudulent purpose in view, knowingly and consciously directed the payment of a claim which, to his knowledge, had no real existence, either in whole or in some substantial part. It is scarcely necessary to say that there is no such finding in the case, but ample findings to the contrary.

This court will sometimes look beyond the findings and into the evidence to sustain a judgment, but not to reverse it. But even if we should consider every fact and circumstance urged by the learned counsel for the contesting creditors, it would be impossible, I think, to give any other construction to the whole instrument than an authority to the assignee to pay what should be found due to the preferred creditor, and upon its face, when properly construed, it contains no direction to pay a fictitious debt.

But it is said that this court in the Second Division took a different view of the effect of the inventory in deciding the former appeal, and that we are bound by that decision. If the facts then and now are identical, it is our duty to follow the former decision, even though convinced, if the case was *res nova*, that our brethren of the Second Division took an erroneous view of the law. It is necessary to adhere to this principle if there is ever to be an end to litigation. It is important, of course, that private controversies should be determined in the court of last resort according to law and justice; but the infirmities of human judgment are such that different tribunals will not always take the same view of the question. When, however, the question has been once decided in this court, or in the Second Division, with co-ordinate powers, the same parties, in the same case, upon the same facts, cannot be permitted to re-open the discussion without great detriment to the public interest and destroying that respect for the decisions of courts which it is important should be maintained. (*Cluff v. Day*, 141 N. Y. 580; *Mygatt v. Coe*, 142 id. 78; *Moore v. Simmons*, 133 id. 695.)

But the view that I take of this case does not trench upon this principle in the slightest degree. This is not now the case that was before the Second Division, but a new case, with new findings and new facts. No court has ever yet held, and certainly the learned court that decided the former appeal did not hold, that the statement of a debt in an assignment or an inventory at an excessive sum was conclusive evidence of fraud, that rendered the assignment void as matter of law. On the con-

trary, it is as well settled, as any principle can be, that such an act does not invalidate the assignment in the absence of actual fraud. If it is the result of mistake or inadvertence, that may be shown. Nothing contrary to this principle was decided on the former appeal, when properly understood, and, in order to get a clear view of the question, we must know just what was then decided and how the case now stands.

The former judgment was not reversed for the reason that the \$1,500 item was found to have been paid, nor because the \$5,000 item did not exist in the precise form stated but in other forms, nor for the reason that there was a mistake of a day or two in the date of a thousand-dollar note, but simply and solely for the reason that the debt was stated at an excessive sum without qualification or explanation. This is entirely clear from the opinion, though it may not be so clear from the head note. Judge HAIGHT, who spoke for the majority, after stating the facts, then states the legal question involved in these words :

“It is contended, however, that it was the indebtedness of Major that was preferred and not the items making up such indebtedness, and that a mistake in giving the items should not avoid the assignment, provided that other items of indebtedness in fact existed. This view would deprive the other creditors of the advantage given them by the statute of knowing ‘the true cause and consideration’ of the claim, but without assenting to the correctness of the proposition we may, for the purposes of this argument, assume it to be sound. The fact still remains that the amount actually owing Major falls short of the amount preferred in the sum of \$845.32.”

The significance of this language is obvious. The learned judge begins by assuming without deciding, that a certain proposition, which he states, is sound, and then in effect he says, conceding all that, the fact still remains that the debt stated exceeds that found by \$845.32, and the opinion then proceeds to deal with the legal effect of that fact, and deals with nothing else. The general result of the whole discussion is stated in the following paragraph of the opinion :

"The referee has said that the assignment was made in good faith, and without intent to hinder, delay or defraud the creditors, but the provisions of the assignment carried out deprives the general creditors of this sum, and the rule is that every party must be deemed to have intended the natural and inevitable consequences of his acts, and where his acts are voluntary, and necessarily operate to defraud others, he must be deemed to have intended the fraud."

The court applied to the case the familiar principle that a person is presumed to intend the natural and necessary consequences of his act. That, however, is never anything but a presumption, and it was never held that the presumption arising from a particular act, unexplained and unqualified, whether the presumption was of a crime or a fraud, could not be removed by evidence that the act was the result of mistake or inadvertence, and that the intention was innocent. Of course the learned court never intended to hold, and did not hold, that an act which, unexplained, created an inference of fraud, could not be explained so as to render it consistent with innocence. The court dealt with two questions, one a question of fact, and the other a question of law. It was assumed that the statement of the debt in the inventory, entirely detached from the qualifying words in the assignment, and standing alone, magnified the claim beyond its real amount, and from that fact, standing in the record unexplained and unqualified, there followed the inference of fraud as matter of law, which vitiated the assignment. There was then no evidence and no finding of fact in the case to rebut the presumption. The only finding then in the case was the general one that the assignment was made in good faith and without any fraudulent intent, but that did not cover the point, since the vice which the court found was not in the assignment but in the inventory, filed twenty days afterwards. There was no evidence and no finding whatever as to the circumstances under which that paper was executed, or as to the intent and purpose with which it was made. There was nothing to change the presumption which it created, or to break its force

and effect as *prima facie* evidence. The court assumed that such a result would be possible, and, therefore, granted a new trial. If it was not possible, or if the statement was deemed conclusive, of course that ended the case and final judgment should have been given.

It is very clear, I think, that the case as now presented is entirely changed. New evidence was given at the last trial in regard to all the facts and circumstances attending the execution and filing of the inventory and the intent and purpose of the parties, and the referee has made comprehensive findings which cover every point. These findings were made upon evidence not only uncontradicted, but, in itself, very reasonable and probable.

It appeared that when the assignment was made the creditor, who resided in Washington, was absent upon the western plains in the service of the government as an engineer. A firm of attorneys at Utica acted for him, and, not knowing all the facts and details of the debt, described it as best they could. Another firm was employed by the assignor to draw the assignment, and they obtained the data relating to the debt in question from the attorneys acting for the creditor. The assignment, when drawn and completed by one member of the firm, was handed by him to his partner, who took it to the assignors for examination. It was then found that the assignors could not describe the debt with perfect accuracy, as some of the books upon which it appeared were not in their possession, and some portion of the money had been paid by the creditor to third parties for the benefit of the assignors. This situation caused the insertion then and there for the first time of the qualifying words found in schedule C, and in this form the assignment was executed and recorded, but the partner, who drew the assignment, was not informed of the change made after it left his hands. Twenty days afterwards this same partner drew the inventory from the same data and memoranda which he used in drawing the assignment, and, being ignorant of the change made in his work by the insertion of the qualifying words, he described the debt in the

inventory as he had described it in the assignment, intending in both papers to describe the same debt in the same way.

These facts are all found by the referee, who then finds that the inventory was made and verified by the debtors under the belief that it had been properly prepared by the attorneys who had charge of the matter, but who had inadvertently given an incorrect description of the debt; that they acted in good faith, without any intent to hinder, delay or defraud creditors, honestly intending to set forth their indebtedness without stating the precise items of the same, which they were unable to state, and without intending to modify or change the statement contained in the assignment.

The objections of the learned counsel for the contesting creditors cannot prevail in the face of these findings.

The complaint also asks relief against the judgment which this preferred creditor recovered upon an offer of judgment on the same day that the assignment was recorded. It is alleged that the judgment is fraudulent because the debt was fictitious, and the relief demanded is that it be vacated and set aside as void. If the views expressed with respect to the assignment should prevail, this phase of the case is of no importance, since the property would vest in the assignee discharged from the lien of any of the subsequent judgments. In any event this feature of the case presents no question of law.

The issue in regard to the judgment was one of fact. The evidence was the same as upon the same issue in regard to the assignment, except that the inventory plays no part in the inquiry. The judgment, when recorded, was for a sum in excess of the real debt of over \$800. The referee found that it was to that extent excessive, but not fraudulent. That it was rendered in good faith for the purpose of securing an honest debt. This finding alone is a complete answer to the objections now made. The judgment was subsequently modified and reduced to the true sum on an application to the court. The court certainly had power to correct its own judgments, and even if it had never been corrected it was good for the sum actually due in the absence of a fraudulent pur-

pose which is completely negated by the findings of the referee. The order correcting the judgment was entered *nunc pro tunc* as of the date of the judgment. No one appealed from it, and it now stands as the result of the exercise of power resting largely in discretion.

Since the judgment was good without the order for what was honestly due, it can work no injury to any of the parties to this action. Besides the original judgment was given in evidence by the contesting creditors, and it was then proper to show by the order correcting it that the excess had been eliminated from the record.

After the decision of the former appeal, upon the application of the assignors, with notice to the assignee, the county judge made an order amending the schedules and inventory *nunc pro tunc* so as to conform substantially to the statement of the debt in the assignment. This order was given in evidence under the objection and exception of counsel for the contesting creditors. The county judge had the power under the statute to make the order. The statute confers it in plain words, thus providing for correcting mistakes or defects in the inventory, which ought not to be permitted if the statement of the debt when once made could be held conclusive. The form in which it was drawn and the time when it might take effect were matters of discretion to be corrected, if erroneous, by appeal, since the order was not void but at most erroneous. The order when made was just as much a part of the assignment as the inventory which it modified, and as it was the basis for the distribution by the assignee of the assigned estate it was for all general purposes evidence of the claims directed to be paid. The only question is how far it could affect an action pending when it was made. The referee expressly held and found that it could not operate as against the contesting creditors to impair or prejudice any right or lien which they had acquired against the assigned property prior to the time of the entry of such order. This ruling protected the contesting creditors against any possible injury and leaves them without any legal or just ground for complaint.

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These amendatory orders had little if any bearing upon the question whether an honest or fictitious debt had been preferred, and as against the contesting creditors were given none. At most they were simply harmless documents on the record. The case in every aspect and upon every point was correctly disposed of in the courts below, and the judgment should be affirmed, with costs to the assignee against Vietor & Achelis, the attachment creditors.

ANDREWS, Ch. J., FINCH and PECKHAM, JJ., concur; GRAY, BARTLETT and HAIGHT, JJ., dissent; GRAY, J., on ground that the court is concluded by the decision in 130 N. Y. 585, in this case, because by the construction there given to the act the inventory is a part of the transaction of assignment and is to be read into the assignment.

Judgment accordingly.

CATHERINE HAINES, as Administratrix, etc., Respondent, v.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD
COMPANY, Appellant.

Where the defendant at the close of the evidence on trial of an action by a jury, moves the court to direct a verdict in his favor, without specifying any ground, and the motion is denied and he excepts, and a verdict is rendered against him, he cannot maintain his exception on appeal by showing that there was a defect in the proof upon some points, and so that the facts did not authorize the verdict, provided that the failure of of proof might have been supplied, had the attention of the other side been called to the defect.

In an action to recover damages for the alleged negligent killing of plaintiff's intestate, the case was contested on the ground that there was no negligence on defendant's part, and that there was contributory negligence on the part of the decedent, and at the conclusion of the whole evidence defendant's counsel asked the court to direct a judgment for defendant, but stated no ground therefor, which motion was denied and defendant excepted. A verdict was rendered for plaintiff and an appeal was brought on the sole point that decedent was upon the evidence, as matter of law, chargeable with contributory negligence, *held*, that the general exception to the denial of the motion was insufficient to present this question, as it was one upon which additional proof might have been given by plaintiff had it been specified.

(Argued January 30, 1895; decided March 5, 1895.)

APPEAL from judgment of the General Term of the Superior Court of Buffalo, entered upon an order made May 2, 1894, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This action was brought to recover damages for the negligent killing by defendant of plaintiff's husband.

The facts, so far as material, are stated in the opinion.

James F. Gluck for appellant. The trial court should, at the close of the evidence, have directed a verdict for the defendant. The exception taken to the court's refusal to do so was valid, and fully presents for review by this court all questions of fact in the case. For the refusal of the court so to do a new trial should be granted. (*Biesegeal v. N. Y. C. & H. R. R. Co.*, 40 N. Y. 9; *Hatty v. N. Y. C. & H. R. R. Co.*, 42 id. 468; *Young v. N. Y., L. E. & W. R. Co.*, 107 id. 500; *Cordell v. N. Y. C. & H. R. R. Co.*, 70 id. 119; *Woodward v. N. Y., L. E. & W. R. Co.*, 106 id. 369; *Scott v. P. R. R. Co.*, 130 id. 679; *C., B. & Q. R. Co. v. Flint*, 22 Ill. App. 502.)

George W. Cothran for respondent. The question of ordinary care is one of fact for the jury. (*Holly v. B. G. Co.*, 8 Gray, 131; *W. R. Co. v. McDaniels*, 107 U. S. 454; *Ernst v. H. R. R. Co.*, 35 N. Y. 9.)

ANDREWS, Ch. J. The plaintiff's intestate died from injuries received while passing along the side of the track of the defendant on Webster street in the city of Tonawanda. He had passed up Sweeney street to its junction with Webster street and then, as the evidence shows, looked up and down the railroad track and, no train being in sight, turned on to Webster street and proceeded for about forty feet along and very near the track of the railroad on Webster street, when he was hit by a train coming behind him, causing the injury of which he died. There was evidence tending to show negligence in the

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management of the train, and the defendant's negligence is not, upon this appeal, denied. The case at the trial was defended both on the ground that there was no negligence on the part of the defendant, and that the deceased was guilty of contributory negligence in not looking after leaving the corner of Sweeney street to see whether there was an approaching train, although he walked thereafter a distance of nearly forty feet in near proximity to the track. The case was contested on the trial on both points, and evidence was given upon the issues by each party respectively. On the conclusion of the whole evidence the defendant's counsel asked the court to direct a verdict for the defendant, but stated no ground, nor did he call the attention of the court or the opposite counsel in any way to the specific point on which the motion was based. The motion was denied and the court then submitted the case to the jury in a charge which fully presented the facts disclosed, bearing upon the question of the defendant's negligence and the contributory negligence of the deceased. The charge was not excepted to by either party and no requests to charge were made by either. The only exception in the case is the exception to the denial of the motion to direct a verdict, as above stated. The jury rendered a verdict for the plaintiff, and this appeal is brought on the single point that the decedent was, upon the evidence, as a conclusion of law, guilty of contributory negligence, and the appellant's counsel relies upon the exception referred to as raising the question.

We think the general exception to the ruling of the court denying the defendant's motion to direct a verdict is insufficient to raise the question now presented. When on a trial by jury a general motion to direct a verdict is granted and an exception is taken by the other party, he is entitled on appeal to a reversal if there was any evidence tending to establish any material fact in his favor, which, if found by the jury, might have changed the result. (*Trustees of East Hampton v. Kirk*, 68 N. Y. 460; *Stone v. Flower*, 47 id. 566.) His exception challenges a scrutiny of the whole evidence, and

the party upon whose motion the direction is made and who is the actor in procuring it, takes the risk, and it is no answer to the exception that if the other party had called the attention of the court to the evidence which required a submission of the case to the jury, the direction might not have been given. But where a defendant, as in this case, makes a motion for a direction without specifying any ground, and the motion is denied, and he excepts to the ruling and a verdict is rendered against him, he cannot maintain his exception on appeal on showing that the facts found did not authorize the verdict, provided the failure of proof might have been supplied if the attention of the opposite counsel had been called to the defect.

It has been frequently held that a general objection to evidence without specifying any ground is ineffectual, unless the evidence offered could under no circumstances be rendered competent, and an exception to the denial of a motion for nonsuit, not pointing out any defect in the evidence, will not entitle the party to a reversal on appeal, on the ground that the evidence was insufficient to sustain the verdict if the defect was, in its nature, one which might have been remedied if attention had been called to it.

The point attempted to be argued in this case was the contributory negligence of the intestate, in not looking behind him for the approaching train after he left the corner of Sweeney street. It was a question which, in its nature, was one upon which additional proof might have been given by the plaintiff. It may be, and probably is true that her evidence on that question had been exhausted, but we cannot know this for certainty. The precedent which a reversal of this judgment would set, that a general exception to a refusal to direct a verdict raises the question whether the evidence given was sufficient to sustain the verdict given, when the attention of the court and counsel on the trial was in no way called to the defect, and when the defect was in its nature amendable, would tend in many cases to great injustice. The case of an action for conversion where a demand was necessary, but was not proved, although it may have been made, is an illustration.

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It is but fair to the court and to the parties that in some general way, at least, attention should be called by the party asking a direction to the point upon which the motion is based. Such a practice will prevent surprise and contribute to an intelligent comprehension by the court and the opposite party of the situation, and unnecessary litigation will thereby in many cases be avoided.

The judgment should be affirmed, with costs.

All concur, except FINCH, J., not voting.

Judgment affirmed.

THE PEOPLE ex rel. SARAH J. BIRD, Appellant, v. EDWARD P. BARKER et al., Commissioners of Taxes, etc., Respondents.

As a special partner is not personally liable for any of the partnership debts, in the assessment of his personal property for the purposes of taxation he is not entitled to a deduction of any portion of the indebtedness of the firm under the provision of the Revised Statutes (1 R. S. 390, 391, § 9, sub. 4), as amended in 1892 (§ 1, chap. 202, Laws of 1892), which authorizes a deduction of "the just debts owing by him."

Where, therefore, a non-resident, who had no property within the state except a sum contributed by her as a special partner to a partnership, was assessed the amount so contributed under the provision of the act of 1855 (§ 1, chap. 37, Laws of 1855), which provides that non-residents doing business in this state as special partners "shall be assessed and taxed on all sums invested in any manner in said business the same as if they were residents," held, that she was not entitled to any deduction on account of the partnership indebtedness.

(Argued February 25, 1895; decided March 12, 1895.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made October 12, 1894, which affirmed an order of Special Term quashing a writ of certiorari to review an assessment of \$50,000 against the relator for the year 1893.

The facts, so far as material, are stated in the opinion.

Sandford R. Ten Eyck for appellant. That part of the act of 1892 which declares that no debt, contracted in the

purchase of non-taxable property, shall be deducted in making assessments for personal property, is void under the Constitution of the United States. (*Brown v. Maryland*, 12 Wheat. 419; *People v. Comrs.*, 67 U. S. 620; *People v. Comrs.*, 69 id. 200; *Cook v. Pennsylvania*, 97 id. 566; *Leisy v. Hardin*, 135 id. 100.) This law is also repugnant to the fourteenth amendment to the Constitution of the United States and to the Constitution and laws of this state. (*G. R. Co. v. Pennsylvania*, 104 U. S. 232; *Detroit v. Osborne*, 135 id. 492; *People v. Ryan*, 88 N. Y. 142; *Gilman v. Sheboygan*, 67 U. S. 510; *P. L. I. Co. v. Massachusetts*, 77 id. 611; *People v. Weaver*, 100 id. 638; *Suprs. v. Stanley*, 105 id. 305; *Robbins v. S. Co.*, 120 id. 489.)

David J. Dean for respondent. The order quashing the writ was not appealable to this court. (*People ex rel. v. Comrs.*, 85 N. Y. 655; *People ex rel. v. Police Comrs.*, 82 id. 507.) The assessment is authorized by chapter 37, Laws of 1885, and the relator is entitled to no deduction on account of debts. (*People ex rel. v. Comrs., etc.*, 4 Hun, 596; *Hoyt v. Comrs., etc.*, 23 N. Y. 234; *Williams v. Bd. Suprs.*, 78 id. 561.)

PECKHAM, J. This is an appeal by the relator from an order of the General Term of the first department affirming an order of the Special Term quashing a writ of certiorari issued to review an assessment made against relator for the year 1893. It appears that the relator is a non-resident of this state, and has no property within its jurisdiction except the sum of \$30,000, which she contributed to the firm of Boyd, Sutton & Co. as a special partner under the Special Partnership Act of this state. On the 9th day of January, 1893, the day fixed by law for making assessments in New York city, the condition of the firm of Boyd, Sutton & Co. was as follows:

Imported goods in original packages.....	\$130,782 00
Imported goods in broken packages.....	11,493 00
Domestic goods	11,901 00

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Debts due.....	\$115,173 00
Cash on hand.....	13,275 00
	<hr/>
Making its total assets.....	\$282,624 00

At the same time the said firm was indebted as follows :

For imported goods.....	\$133,633	
For domestic goods.....	11,103	
For borrowed money.....	31,215	
	<hr/>	176,951 00
		<hr/>
Leaving its net assets.....		\$105,673 00

The relator urges that after deducting the amount of imported goods in original packages there was but \$151,842 of taxable property belonging to the firm, while its debts amounted to \$176,951, and she claims that these facts show there was nothing upon which to base an assessment against any member of the firm.

By section 1 of chapter 37 of the Laws of 1855 it is enacted as follows :

"All persons and associations doing business in the state of New York, as merchants, bankers or otherwise, either as principals or partners, whether special or otherwise, and not residents of this state, shall be assessed and taxed on all sums invested in any manner in said business the same as if they were residents of the state, and said taxes shall be collected from the property of the firms, persons or associations to which they severally belong."

By subdivision 4 of section 9 of the Revised Statutes (1 Rev. St. 390, 391), as amended by section 1 of chapter 202 of the Laws of 1892, provision is made for deducting just debts owing by the party assessed from the taxable personal property owned by him, "but no deduction shall be made or allowed for or on account of any debt or liability contracted or incurred in the purchase of non-taxable property or securities owned by him or held for his benefit," etc. The relator says that the defendants refused her application to deduct

from her assessment any portion of the amount owed by the firm for imported goods (\$133,633) under the authority of the above-quoted amendment to the Revised Statutes. She admits that such act is authority for the defendants' refusal, if constitutional, but she denies its validity as to that portion which declares that no debt contracted in the purchase of non-taxable property shall be deducted in making assessments, and she alleges that under subdivision 3 of section 8 of article 1 of the Federal Constitution, which gives power to Congress to "regulate commerce with foreign nations and among the several states, and with the Indian tribes," and also under subdivision 2 of section 10 of the same article, which provides that "no state shall without the consent of the congress lay any imposts or duties on any imports or exports save what may be absolutely necessary for executing its inspection laws," such act of the legislature of this state is void either as a regulation of commerce or as laying imposts or duties on imports. The defendants, while asserting the statute to be valid, at the same time claim that relator cannot deduct indebtedness at any place other than her residence in New Jersey, and cite *People ex rel. Thurber-Whyland Co. v. Barker* (141 N. Y. 118) as authority for their contention.

We do not think that the validity of the act in the matters alluded to is necessarily involved in the decision of this case, and we decide it without reference to that question. Under the act of 1855 provision is made for the assessment of all persons doing business in this state who are non-residents thereof, either as principals or partners, whether special or otherwise, and the assessment and taxation of such non-residents are to be on all sums invested in any manner in business as stated in the act, the same as if they were residents of the state. The reason for the enactment of this statute and its proper construction have been alluded to in cases decided by this court. (See *Hoyt v. Commrs. of Taxes*, 23 N. Y. 224; *People ex rel. Thurber-Whyland Co. v. Barker*, 141 id. 118; *People ex rel. Bay State Shoe, etc., Co. v. McLean*, 80 id. 254.) As a non-resident is to be assessed under the act the

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same as if he were a resident of the state, we find upon looking at the manner in which assessments against a resident are to be made (1 Rev. St. above referred to), that the assessors are to prepare an assessment roll, in which they shall set down in four separate columns, and according to the best information in their power: In the first, second and third columns, various matters not herein material.

"4: In the fourth column, the full value of all the taxable personal property owned by such person after deducting the just debts *owing by him,*" etc.

The relator in this case is a special partner of the firm above mentioned. She deposited with the general partners in that business the sum of \$30,000 in cash, and, under the provisions of the Special Partnership Act, she is not personally liable for any of the debts of such partnership. So far as she is concerned she risked \$30,000 of her property by investing it as special partner in that firm, but so long as she complies with the provisions of the statute, and remains a special partner, she is personally liable for no debts of the firm. No debts of the partnership could be collected from her individually, because she is not liable for and does not owe any such debts, and as she is not liable for and does not owe any portion of them, the statute does not provide that she may deduct from the amount of money which she has invested in the partnership any portion of the debts of such partnership. The debts to be deducted are the just debts of the individual who is to be assessed, and how can it be said that she owes any debts when by the very terms of the Special Partnership Act she is not liable for them in any event so long as she complies with the provisions of that act and does not become a general partner? If the facts showed that the firm was insolvent and so the fund contributed by the relator had been lost in the business ventures of the firm, such a condition would show that the relator no longer had the fund which she originally invested with the firm, and so she would not be a fit subject for assessment. Here, however, the firm has assets largely above its indebtedness and more than the \$30,000 originally invested by the relator, and

it, therefore, appears that her contribution is intact. The fact that the firm owes debts for the purchase of non-taxable property is, in such case, immaterial. She owes nothing.

Without deciding the constitutional question which has been presented to us, we hold that the relator was not entitled to deduct any portion of the indebtedness of the firm because she did not owe any portion thereof. We decide nothing else.

For these reasons the order of the court below should be affirmed, with costs.

All concur.

Order affirmed.

JOHN MORTON et al., Appellants, v. SARAH E. TUCKER et al.,
Respondents.

Under the provision of the Mechanics' Lien Law (sub. 6, § 24, chap. 842, Laws of 1885) authorizing the owner of premises, against which a lien has been filed, to discharge the lien by executing a bond as specified, "conditioned for the payment of any judgment against the property," a bond so given takes the place of the property and becomes the subject of the lien, the same as moneys paid into court, or securities deposited after suit brought to foreclose the lien.

The remedy, therefore, to enforce the obligations of the sureties to such a bond is not by an action at law upon the bond, but by an action in equity in which all persons interested, including the sureties on the bond, are made parties, and it is not a condition precedent to the bringing of the action that the lienor shall exhaust his remedy against the landowner by recovering a judgment of foreclosure in form against the property described in the notice of lien.

The complaint in such an action should be in the usual form of a complaint in an action to foreclose the lien, with the exceptions that it should allege the giving of the bond and the consequent discharge of the lien, and instead of asking judgment for the sale of the premises it should demand relief against the persons executing the bond for the amount that shall be determined to be payable upon the lien.

The complaint in such an action alleged that plaintiffs sold at prices agreed upon and delivered to the defendant T., the owner of certain premises described therein, materials specified, to be and which were, used in the erection of buildings thereon, and that no portion thereof had been paid; that a notice of lien in the form prescribed by law was filed within ninety days after the materials were furnished; that T. filed with the

clerk a bond duly executed with sureties (who were made defendants) and approved by a justice of the Supreme Court, which bond was conditioned for the payment of any judgment against the property as required by the statute, and thereupon the lien was discharged by order of the court. On demurrer to the complaint, *held*, that it stated facts sufficient to constitute a cause of action.

(Argued February 25, 1895; decided March 12, 1895.)

APPEAL from order of the General Term of the City Court of Brooklyn, made December 24, 1894, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term sustaining a demurrer to the complaint.

The allegations of the complaint, so far as material, are set forth in the opinion.

Herman F. Koepke for appellants. The lien having been discharged by the giving of a bond, judgment cannot actually be rendered against the property. (*Lawson v. Reilly*, 13 Civ. Pro. Rep. 290.) The lien against the property being discharged, the sureties stand in the place of the property. (*Ward v. Kilpatrick*, 85 N. Y. 418; *Bulkeley v. Moses*, 23 Civ. Pro. Rep. 28.) A reasonable construction should be adopted in all cases where there is a doubt or uncertainty in regard to the intention of the lawmakers. (*People ex rel. v. Lacombe*, 99 N. Y. 43.)

E. Raymond for respondent. The defendants O'Keefe and O'Hara are not primarily liable in this action as sureties, and cannot be made liable as such until the plaintiffs have exhausted their remedy by action against the defendant Sarah E. Tucker, and until they have recovered a judgment of foreclosure in form against the property described in the lien. (*Sheffield v. Early*, 57 N. Y. S. R. 146; *Lawson v. Reilly*, 13 Civ. Pro. Rep. 290; *Scherrer v. Hopper*, 45 N. Y. S. R. 638; *Highton v. Dessau*, 46 id. 922; *Brandt v. Radley*, 23 N. Y. Supp. 277; *Heinlein v. Murphy*, 51 N. Y. S. R. 435; *Kruger v. Braender*, 3 Misc. Rep. 275; *Garland v. Van*

Rensselaer, 54 N. Y. S. R. 74; *Cunningham v. Doyle*, 5 Misc. Rep. 219; Code Civ. Pro. § 814.) The Mechanics' Lien Law does not alter or extend the liability of sureties, which is the same as in other cases, and which is limited to the express terms of the contract, and their obligations should be construed strictly and favorably to them. (*Ward v. Stahl*, 81 N. Y. 406; *Wood v. Fisk*, 63 id. 245.)

HAIGHT, J. The complaint, in substance, alleges that during the months of July and August, 1894, the plaintiff sold and delivered unto the defendant Sarah E. Tucker lime, bricks and lath with which to erect seven buildings on a lot of land in the city of Brooklyn (describing the premises), and that such property was sold and delivered at the prices agreed upon between the defendant Tucker and the plaintiffs, which amounted in the aggregate to \$528.49, no part of which has been paid, and that the same is now due and owing; that on the 13th day of August, 1894, and within ninety days after the furnishing of the materials as alleged, the plaintiff filed in the office of the clerk of the county of Kings a notice of lien in the form and manner prescribed by law; that on the 29th day of August, 1894, the defendant Tucker filed with the clerk of that county a bond duly executed by her, with the defendants O'Keefe and O'Hara as sureties, in the amount fixed by the Supreme Court, "conditioned for the payment of any judgment which might be rendered against the said property" in any action brought by these plaintiffs; that the bond was approved by a justice of the Supreme Court, and, after filing, an order was duly made by the court discharging the plaintiff's lien. The complaint then demands judgment against the defendants for the sum of \$528.49, with interest, and that the lien be declared a valid lien until its discharge as aforesaid, etc.

The defendants O'Keefe and O'Hara demur upon the ground that the complaint does not state facts sufficient to constitute a cause of action. It is contended on behalf of the respondents that they being sureties upon the bond are not

primarily liable, and that they cannot be charged upon the bond until the plaintiffs have exhausted their remedy by action against the defendant Tucker and have recovered a judgment of foreclosure in form against the property described in the notice of lien.

On behalf of the appellants it is insisted that an action at law can be maintained upon the bond without first resorting to an action to foreclose the lien upon the property. Upon these questions the courts below have differed. (*Sheffield v. Early*, 57 State Reporter, 146; *Lawson v. Reilly*, 13 Civ. Pro. R. 290; *Scherrer v. Hopper*, 45 St. Rep. 638; *Highton v. Dessau*, 46 id. 922; *Brandt v. Radley*, 23 N. Y. Supp. 277; *Heinlein v. Murphy*, 51 St. Rep. 435; *Kruger v. Braender*, 3 Delehanty, 275; *Garland v. Van Rensselaer*, 54 St. Rep. 74; *Cunningham v. Doyle*, 5 Delehanty, 219.)

We find obstacles which prevent us from indorsing either contention.

After a lien has been discharged it may be difficult to obtain a judgment against the premises, for the owner has but to interpose the order discharging and vacating the lien in order to defeat the recovery of such a judgment.

An action at law could not well be maintained upon the bond, for the reason that the right of the plaintiffs to maintain the action might depend upon the priority of their lien and of there being a sufficient sum unpaid upon the contract with the owner with which to pay their claim, involving rights and equities of other persons who could not properly be made parties in an action at law upon the bond.

It appears to us that the proper remedy is clearly pointed out by the statute. It provides that a claimant who has filed a notice of lien may enforce his claim against the property by a civil action in the same manner and form of instituting and prosecuting an action for the foreclosing of a mortgage upon real property. That the plaintiff must make the persons who have filed notices of liens against the property, as well as those who have subsequent liens and claims by judgment, mortgage or conveyance, parties defendants; and the court in which the

action is brought is required to determine the equities of all the parties to the action, the counterclaims or set-offs, and the priority and amount of each lien chargeable against the land. (Laws of 1885, chap. 342, secs. 7, 8 and 17.) The action is in equity, in which the rights and equities of all the parties interested must be determined. The statute then further provides for the discharging of the liens before and after action has been commenced. At any time after the action has been commenced the owner of the property may make an offer, in writing, to pay into court any amount stated in the offer, or to execute and deposit any securities or papers which he may describe in discharge of the lien. If the offer is accepted the court in which the action is pending may make an order, upon the compliance with the offer, discharging the lien, in which case the money or securities deposited "take the place of the property upon which such lien or liens was or were created, and shall be subject to the same." (Sec. 18.) It will be observed that here we have an express provision of the statute by which the money paid, or the securities deposited in discharge of a lien, shall take the place of the property and become subject to the lien in the place of the property.

Then follow further provisions for the discharge of the lien either after or before action brought, in which a bond with two or more sureties may be given by the owner in such sum as the court may direct, but not less than the amount claimed in the notice of lien "conditioned for the payment of any judgment which may be rendered against the property." (Sec. 24, subdiv. 6.) The conflicting views in the courts below arise out of the construction of this provision. But it appears to us that the meaning is apparent. The sureties in the bond intended, and must be understood as undertaking, to pay the amount which it should be adjudged was due and owing to the plaintiffs and which was chargeable against the property by virtue of their notice of lien. In other words, the condition was for the payment of any judgment which might have been rendered against the property had not the bond been given. The bond, as we have seen, is given to

discharge the lien. It is one of the proceedings provided for by the statute, and it was evidently intended that the bond should take the place of the property and become the subject of the lien in the same form and manner as is provided for in the case of the payment of money into court, or the deposit of securities under an order of the court after action brought. (*Ward v. Kilpatrick*, 85 N. Y. 413-418.)

If this is so the practice is simple. The action is in equity brought under the statute in which all of the persons interested, including the sureties upon the bond, are made parties. The complaint is in the usual form, with the exception that it should allege the giving of the bond and the discharging of the lien, so far as the real estate is concerned, and instead of asking judgment for a sale of the premises it should demand relief as against the persons executing the bond for the amount that should be determined to be payable upon the lien. The court then upon the trial can determine the rights and equities of all of the parties and award the final judgment contemplated by the statute.

The complaint in this action alleges that the material was sold to the owner of the premises. It does not appear that there was any contractor, sub-contractor or other lienor who should be made parties. So far as the appellants are concerned the complaint states all the essential facts required, and it is not apparent upon the face thereof that other persons have equities which are required to be determined herein. We think the complaint is sufficient and properly states a cause of action.

The judgment of the General Term and that of the Special Term should be reversed, with costs in all the courts; but with leave to the defendants to withdraw the demurrer and answer over within twenty days, upon payment of the costs of the demurrer and of the appeals in this court and the General Term.

All concur.

Judgment reversed.

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SOLOMON CASTORIANO, Respondent, v. RENE DUPE, Appellant.

Where it appears by the complaint in an action in equity that plaintiff is entitled to equitable relief by way of restraining the doing of some act by defendant, the granting of an injunction *pendente lite* is within the reasonable discretion of the trial court, and the exercise of this discretion is not reviewable here.

The complaint in this action alleged the execution by plaintiff of a bill of sale, absolute on its face, of certain embroideries and its delivery to defendant as collateral security for a debt owing to him, the amount of which was to be determined at the date of the transfer, but was not and has not been; that defendant claims to hold the goods as absolute owner, and asserts a liability on plaintiff's part for sums not due or owing; that an accounting is necessary to ascertain the true amount of the debt; that plaintiff is ready and willing to pay whatever sum may be adjudged due from him in order to redeem the goods, and had made a tender of a sum specified, but that defendant refused to accept it, and has advertised the goods for sale at public auction; that the embroideries are peculiar in their character, and their value can only be ascertained by private sales to a narrow range of customers, and they would be sacrificed by a sale at public auction. Judgment was asked that the bill of sale be declared to be collateral; that an accounting be had, and upon payment of the amount found due that the goods be restored to plaintiff; also for an injunction restraining the sale. *Held*, that the complaint set forth a good cause of action; that a remedy at law, *i. e.*, by replevin to recover the goods, was not adequate, as the amount due was in dispute and uncertain; that the court below had power to make an order granting a temporary injunction; and that such an order was not reviewable here.

(Argued February 25, 1895; decided March 12, 1895.)

APPEAL from order of the General Term of the Court of Common Pleas for the city and county of New York, made January 9, 1895, which modified, and affirmed as modified, an order of Special Term granting an injunction upon application by plaintiff.

The nature of the action and the facts, so far as material, are stated in the opinion.

A. H. Parkhurst for appellant. The injunction should be absolutely vacated on the insufficiency of the papers upon which it was granted. (Code Civ. Pro. § 604; Beach on Inj.

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§§ 18, 47, 133, 136; *McHenry v. Jewett*, 90 N. Y. 58; *T., etc., R. R. v. B., etc., R. R.*, 86 id. 107; *Jackson v. Bunnell*, 113 id. 216; *Olssen v. Smith*, 7 How. Pr. 481; *Mowry v. Sanborn*, 65 N. Y. 584; High on Inj. §§ 7, 35; *Martin v. Gross*, 4 N. Y. 337; *Cushing v. Ruslander*, 47 Hun, 19, 23; *Selchur v. Baker*, 93 id. 59.) When there is a perfect remedy at law an action in equity for relief by injunction cannot be maintained. (*Porter v. Parmley*, 43 How. Pr. 453; *Hulsen v. Walter*, 34 id. 388; *Charter v. Stevens*, 3 Den. 388; Code Civ. Pro. § 3339; *Marsh v. McNair*, 99 N. Y. 178; *Barry v. Ins. Co.*, 110 id. 1; *Thomas v. Scutt*, 127 id. 140; *Barry v. Colville*, 53 Hun, 621; *Despard v. Walbridge*, 15 N. Y. 734; *Horn v. Keteltas*, 46 id. 605; *Marvin v. Prentice*, 94 id. 301; *Hutchins v. Hutchins*, 98 id. 65; *Mathews v. Sheehan*, 69 id. 585; *Thompson v. Hodskin*, 13 Wkly. Dig. 367; *De Klyn v. Davis*, 1 Hopk. 135; *Tiffany v. St. John*, 65 N. Y. 315; *Uhlmann v. N. Y. L. Co.*, 109 id. 421, 423.) A party cannot rush into equity for the purpose of depriving defendant of the constitutional right of a trial by jury. (*Grand Chute v. Winegar*, 15 Wall. 373.)

Franklin Pierce, for respondent. The order made by the General Term herein is not appealable to this court. (*H. R. T. Co. v. N. T. Co.*, 121 N. Y. 397.) It is not really claimed by the appellant herein that the complaint does not set forth a cause of action. His claim is rather that the plaintiff has an adequate remedy at law, and, therefore, cannot bring an action in equity and obtain an injunction. Even though this be true, the defendant in order to insist that the plaintiff has an adequate remedy at law must allege it in his answer. (*Ostrander v. Weber*, 114 N. Y. 102.) The complaint sets forth a perfect cause of action in equity. (Thomas on Chat. Mort. & Cond. Sales, §§ 213-220; Pom. Eq. Jur. § 1230; *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 100; *Harrison v. Bray*, 92 N. C. 488; *Gooch v. Vaugh*, Id. 610; *Bridger v. Morris*, 90 id. 32; *Vechte v. Brownell*, 8 Paige, 212; *Moffett v. Tuttil*, 4 Hun, 75; *Strahlheim v.*

Wallbach, 12 Daly, 313; *B. A. Assn. v. Watson*, 38 Hun, 945; *Mora v. McCredy*, 2 Bosw. 662; *Coldwell v. C. W. Co.*, 4 T. & C. 179; *Sickles v. M. G. L. Co.*, 64 How. Pr. 33; *D. M. Co. v. Roeber*, 35 Hun, 451; 106 N. Y. 473; *Case v. McCabe*, 35 Mich. 101.)

FINCH, J. This appeal is from an order granting an injunction during the pendency of the action. We regard such an order as within the discretion of the trial court in a case where it appears by the complaint that the plaintiff is entitled to equitable relief. (*Hudson River Telephone Co. v. Waterliet Turnpike Co.*, 121 N. Y. 397.) The complaint here alleges the execution by plaintiff of a bill of sale, absolute on its face, of certain embroideries, and its delivery to the defendant as collateral security for a debt owing to him; that the amount of that debt was by agreement to have been determined at the date of the transfer, but was left undetermined and remains so still; that the defendant claims to hold the goods as absolute owner and asserts a liability on the part of plaintiff for sums not in truth due and owing; that an accounting is needed to ascertain the true amount of the debt which plaintiff must pay in order to redeem his property; that the embroideries are articles of a peculiar character, whose value can only be reached by private sales to a narrow range of purchasers, and which would be sacrificed by a sale at public auction; that plaintiff has tendered to the defendant the sum of eighteen hundred dollars to redeem the pledged goods, which the defendant has refused and has advertised the property for sale; and that the plaintiff is ready and willing to pay whatever sum may be adjudged to be due from him in order to redeem the pledged goods. Judgment is then demanded that the bill of sale be declared to be collateral to the debt due the defendant; that an accounting be had to settle the amount of that debt; that upon its payment the defendant be required to restore the goods, and that an injunction issue restraining a sale which would make the final relief demanded ineffectual.

There can be no doubt that a sufficient cause of action in

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equity is stated in the complaint. To turn the bill of sale into a collateral security merely, and then to redeem the pledge upon payment of the debt to be ascertained by an accounting is clearly proper subject-matter for an equitable action. But the appellant principally relies upon the contention that the complaint discloses on its face the fact that plaintiff has an adequate remedy at law, and so there is no ultimate right to equitable relief. The claim is that, having tendered eighteen hundred dollars and demanded a return of the goods, he may sue at law and recover the embroideries by a replevin. That remedy would perhaps be adequate if there was no question about the amount of the debt, but is certainly not adequate where the amount is in dispute and wholly uncertain. The plaintiff was not bound to peril his whole right by an adoption of the legal remedy, but was at liberty to redeem in equity where an accounting could be had and the ascertained debt be paid.

It follows that the trial court had power to grant the temporary injunction in the exercise of its reasonable discretion, and no appeal lies to this court from the order.

The appeal should be dismissed, with costs.

All concur.

Appeal dismissed.

THE PEOPLE ex rel. MICHAEL BRADY, Appellant, v. JAMES J. MARTIN et al., Commissioners, etc., Respondents.

Under the provisions of the New York Consolidation Act (§ 307, chap. 410, Laws of 1882), as amended in 1885 (chap. 364, Laws of 1885), which provides that any member of the police force who has performed duty thereon for twenty years or more, "shall, by resolution adopted by a majority vote of the full board, be relieved and dismissed from such force and service and placed on the roll of the police pension fund," the police board is not absolutely bound to pass the prescribed resolution, where, upon application of a member of the force to be retired and placed on the pension roll, it appears that he has served for twenty years; a discretion is vested in the board, not an unlimited and unreviewable discretion, but a judicial one, to be executed reasonably and fairly.

Where, in proceedings by mandamus to compel said board to pass a resolution granting the application of a member of the police force who had served the prescribed twenty years, to be relieved from the force and placed on the pension roll, it appeared that immediately after the application, and before it had been acted upon, grave charges of misconduct on the part of the applicant as a policeman, were preferred against him, *held*, that the board had the right, before proceeding to act upon the application, to investigate the charges, and if found to be true and of such a nature as to authorize conviction, it would be justified in convicting and dismissing the relator from the force, and the dismissal would be a conclusive reason for denying his application to be placed on the pension roll; that while it was the duty of the board to act with reasonable promptness upon the charges preferred, it must be assumed that they would act in entire good faith; and so, that the application for the mandamus was properly denied.

(Argued February 25, 1895; decided March 12, 1895.)

APPEAL from order of the General Term of the Court of Common Pleas for the city and county of New York, made March 13, 1894, which affirmed an order of Special Term denying an application by the relator for a peremptory writ of mandamus.

The relator herein applied to the Special Term of the Court of Common Pleas for a mandamus to compel the defendants, who are the commissioners of police of the city of New York, to adopt a resolution relieving and dismissing him from the police force and placing him upon the roll of the police pension fund, according to the provisions of section 307 of chapter 410 of the Laws of 1882, and the act amendatory thereof. The application was denied, and from that order denying the application the relator appealed to the General Term, which affirmed the order, and from the order of affirmance he has appealed to this court.

It appears by the papers that the relator, on the 4th day of January, 1894, had been a member of the police force of the city of New York, and had done duty thereon for a period of a little more than twenty years, and on that last-mentioned day he made an application in writing to the board of police commissioners to be relieved and dismissed from the force and placed upon the roll of the police pension fund, and he stated

that, at the time such application was made, there were no charges of misconduct pending, nor had any been preferred against him, and he alleged in his affidavit that the board of police commissioners had held several meetings since his application was presented to them, and they had failed and neglected to act thereon as required by law. On the 12th of January, 1894, he gave notice to the defendants in writing, and therein demanded that they take immediate action upon his application, and that in case of their failure to pass the resolution as required by law at the next meeting of their board, he notified them that he should apply for a peremptory writ of mandamus to compel them to take such action. He further stated that on the 12th of January, 1894, and subsequent to the service of the above-mentioned demand upon it, the police board held a meeting and neglected and refused to comply with the demand, and denied his application and refused and neglected to comply therewith up to the time of the making of his affidavit, which was January 13, 1894. He also stated that since making his application to be retired there had been preferred to the defendants as the board of police certain malicious and false charges by certain persons inimical to him, which charges were set down for hearing before it on Wednesday, January 17, 1894, and he alleged that upon such charges the board "threatened to find deponent guilty and dismiss him from his said office therefor." He, therefore, asked that a writ of mandamus should be granted and that all proceedings upon the part of the board in connection with the charges above mentioned should be stayed until the final determination of his application for such mandamus.

Upon the hearing before the Special Term an affidavit of one of the defendants was read, in which it was admitted that the relator had made written application to the board for retirement on the 4th day of January, 1894. It was alleged, however, that on the next day, January 5th, 1894, when the application of the relator came before the board of police for action, there had been filed with the board by the superin-

tendent of police three separate charges of serious misconduct on the part of the relator, copies of which charges were annexed to the affidavit. It was further shown that the defendant board held over any action on the application of the relator until it could investigate these charges, and that the investigation thereof was set down for hearing before the board on January 17, 1894, but that such hearing was prevented by the granting of the order to show cause by the Special Term staying all proceedings in relation to any charges until the decision of the application for the mandamus and the removal of the stay. It was further alleged in the affidavit that it was the intention of the board to proceed promptly with the hearing of these charges against the relator as soon as the stay should be removed, and as soon as the charges should be investigated the board would promptly proceed to consider the application made by him for his retirement.

The charges, which were annexed to the affidavit, charged that the relator on the 30th of September, 1892, asked and received from the person named in the charge a sum of \$75 as part of the consideration for securing his appointment on the police force in the city of New York; also that in the year 1889 the relator arrested a man, whose name was given, for a violation of the Excise Law, and in consideration of the sum of \$25 received by him from the person arrested, relator allowed such person to go at large and neglected to convey him to the station house; also that the relator in the early part of the year 1890 received from a person named the sum of \$75 as part consideration for securing his appointment on the police force of the city of New York, which relator did not pay back until compelled to do so.

Louis J. Grant for appellant. The statute as amended in 1885 is not discretionary but mandatory (save in the matter of the amount of pension to be allowed), provided the requisite statutory facts are found to exist. (Laws of 1882, chap. 410, § 307; *People ex rel. v. French*, 108 N. Y. 109; Laws of 1885, chap. 364, § 2; *People ex rel. v. French*, 52 Hun, 464.)

N. Y. Rep.] Opinion of the Court, per PECKHAM, J.

Statutes should be read according to the natural and obvious import of the language, without resorting to a forced construction, for the purpose of limiting their operation. (*In re N. Y. & B. B. Co.*, 72 N. Y. 527.)

David J. Dean for respondent. The statute is not mandatory. (Laws of 1882, chap. 410, § 307; Laws of 1885, chap. 364; *People ex rel. v. French*, 46 Hun, 232.) The fact that the charges brought against relator would, if true, subject him to criminal prosecution, and that he has not been convicted thereon in a criminal court, does not prevent the commissioners from proceeding with his trial. (*People ex rel. v. French*, 60 How. Pr. 337; *People ex rel. v. French*, 32 Hun, 112; *People ex rel. v. Mayor, etc.*, 52 id. 483; 126 N. Y. 621.)

PECKHAM, J. By section 307 of chapter 410 of the Laws of 1882, commonly called the Consolidation Act relating to the city of New York, it was provided that any member of the police force who had performed duty for a period of twenty years or upwards, might "in the discretion of the board of police, by resolution, unanimously adopted by a full board, be retired from service and placed upon the police pension roll." This provision of course manifestly and in terms vested a discretion in the board of police in regard to the adoption of the resolution. The law stood in that condition until 1885, when, by chapter 364 of the laws of that year, the section was amended so as to provide that any member of the police force who has performed duty therein for a period of twenty years or upwards, upon his own application in writing, "shall, by resolution, adopted by a majority vote of the full board, be relieved and dismissed from such force and service and placed on the roll of the police pension fund, and awarded and granted, to be paid from said pension fund, an annual pension during his lifetime of a sum of not less than one-half the full salary or compensation of such member so retired; provided, however, that no pension granted under the provisions of this section shall exceed the sum of one thousand dollars per annum,

except," etc., the provision following being immaterial to the case before us. The question for our determination is whether, by this amendment, all discretion was taken from the board of police, and that upon an application of a member of the police force who had served for twenty years the board was bound, under all circumstances, to adopt a resolution dismissing him from the force and placing him upon the pension roll. The relator claims that the board had no discretion except to determine the fact whether he had served the requisite length of time, and to decide upon the amount of the pension to which he might be entitled. The defendants contend that by the terms of the provision they are not bound at all events to pass the resolution, but that it is subject to a discretion in such board, to be reasonably and fairly exercised upon the merits of each application.

We think that by the amendment the members of the police board were not entirely divested of all discretion in regard to the adoption of the resolution retiring the applicant, and that the board was not bound to grant the application upon the mere fact that he had served twenty years upon the force. The effect of the amendment was to eliminate the necessity of a unanimous vote of the full board for the adoption of the resolution retiring the applicant. We cannot see how proper effect can be given to the language which requires a majority vote of the full board for the adoption of the resolution, unless some discretion is vested in the members of the board upon the subject. The act does not assume to dictate to the members how they shall vote upon the resolution. It does require for its adoption a majority vote of all the board. One member may, therefore, vote against it. Which one shall it be? No more power is given to one member than to another to vote against it, and in voting against it the member who does so uses his judgment and discretion. Judgment and discretion being given to some member of the board, how can it be said that it is not given to all? If two members should vote against the resolution and resort to the courts must be had for the purpose of compelling the adoption of the resolu-

tion by a majority vote, how should the order of the court be enforced? Each member of the board might claim that he had the right under the statute to vote against the adoption of the resolution according to the dictates of his honest judgment, and how could the court single out any one of the four members and allow him to use his judgment, while denying that right to the other three? Or, if the language of the statute were to be used in the order of the court and the board should be directed as a body to adopt the resolution by a majority vote, ought any member of that board to be proceeded against as for a contempt in using his judgment and voting against the resolution? The court has no power under this statute to direct that all the members shall vote for it; and, if not all, which three of them shall it direct? And how can it be said that any one has violated the statute or the order of the court when he has but exercised his discretion and judgment and refused to vote for the adoption of the resolution? From the very language of the section it seems to us that some discretion is vested in the members of the board. If the legislature intended otherwise, and that the resolution should be passed at all events when the fact of the twenty years' service was ascertained, it seems to us clear that other and different and plainer language would have been employed. The board has been invested with authority to retire the applicant by a majority vote of the full board, but as no direction has been given requiring the members to vote for the adoption of the resolution, it follows that they must be at liberty to vote in favor of or against such application.

This question was decided in the same way we now decide it in the case of *People ex rel. Bolster v. French*, by the General Term of the first department, which case is reported in 46 Hun, 232, and we agree with the reasoning adopted by Judge DANIELS in delivering the opinion of the court in that case. The learned judge at Special Term in this case took the same view and for the same reasons. The case of *People ex rel. Tuck v. French* (108 N. Y. 105), while not determining the question, looks in the same direction. We do not

mean by this construction of the act to say that there is in all cases an unlimited and unreviewable discretion vested in the members of the board of police to act in an arbitrary or wholly unjustifiable manner in refusing to adopt the resolution, being guided by their own arbitrary will and discretion. The discretion is a judicial one, to be exercised reasonably and fairly upon the application of the policeman for retirement. Generally, it would appear to be the duty of the board to grant such application when the facts upon which the right of the policeman depended to make it were made reasonably clear. But where grave charges of misconduct have been preferred immediately after the application for retirement has been made, and before it has been acted upon by the board, we think the board has the right, before proceeding to act upon the application, to investigate such charges; and if it appear upon such investigation that the charges are not simply the result of malice, and are not stale, and are true in fact, and are also of such a nature as would authorize the board, upon conviction, to dismiss the offender from the force, then such board would be entirely justified in convicting and dismissing him, and the dismissal would furnish a conclusive reason for the denial of the application to place the officer upon the pension roll. It would be the duty of the board to act with reasonable promptness upon the charges preferred against an applicant, and it must be assumed it would also act upon them in entire good faith and with a desire to honestly discharge its official duty.

We are of the opinion that the courts below have properly construed the section in question, and the order appealed from should, therefore, be affirmed, with costs.

All concur.

Order affirmed.

THE PEOPLE ex rel. DAVID L. FOLLETT et al., Respondents, v.
ASHBEL P. FITCH, Comptroller, etc., Appellant.

The provision of the new Constitution (§ 12, art. 6), providing that the compensation of the judges and justices thereinbefore mentioned "shall not be increased or diminished during their official terms," is not retroactive in its effect; and so, does not affect statutes increasing compensation enacted before the Constitution went into effect.

The provision of the New York Consolidation Act (§ 1109, chap. 410, Laws of 1882), as amended in 1893 (Chap. 104, Laws of 1893), providing that where a justice of the Supreme Court residing outside of the first judicial district shall be designated as one of the justices of the General Term in the first judicial department, he shall be paid by the city "such sum as shall be certified to be reasonable by the presiding justice" of that department, is a proper and constitutional exercise of legislative power. It is not a provision for compensation for services, but simply a scheme for reimbursing expenses and disbursements; and so, is not invalidated or affected by the provision of the old Constitution (§ 14, art. 6, as amended in 1867), declaring that the compensation of judges and justices therein named for their services shall not be decreased during their official terms; nor does the said statutory provision tend in any way to disturb the policy that seeks to maintain uniformity of salary among judicial officers of the same grade.

People ex rel. v. Wemple (115 N. Y. 802), distinguished.

(Argued February 25, 1895; decided March 12, 1895.)

APPEAL from order of the General Term of the Superior Court of the city of New York, made February 15, 1895, which affirmed an order of Special Term granting an application by the relator for a writ of peremptory mandamus.

The facts, so far as material, are stated in the opinion.

David J. Dean for appellants.

Elihu Root for respondents. Chapter 104 of 1893 is a consistent expression of a long-established legislative policy to make up to justices of the Supreme Court the increase in the expenses of living occasioned when they are required to perform duties away from their homes. (Laws of 1870, chap. 408, § 9; Laws of 1852, chap. 374; Laws of 1855, chap. 575;

Laws of 1882, chap. 410.) The compensation provided for by chapter 104 of the Laws of 1893 is not "compensation for services" within the meaning of the constitutional provisions above quoted. (Laws of 1872, chap. 541; *People ex rel. v. Wemple*, 52 Hun, 414; 115 N. Y. 302; Laws 1893, chap. 89, 726.) If the compensation for expenses and disbursements, provided for by chapter 104 of the Laws of 1893, does not come within the constitutional description of "compensation for services," then it is compensation established by law within the meaning of the constitutional provision. (*Barto v. Himrod*, 8 N. Y. 483.) The change from old article 6, section 14, to new article 6, section 12, strengthens the argument for the validity of the act of 1893. (Const. N. Y. art. 1, § 16; *Id.* art. 6, § 5.)

BARTLETT, J. This is an appeal from an order of the General Term of the Superior Court affirming an order of the Special Term which directed the issue of a writ of peremptory mandamus to the comptroller of the city of New York, commanding him to deliver to the relators certain warrants which were for the amounts certified by the presiding justice of the Supreme Court in the first judicial department as a reasonable sum to be paid by the city of New York as compensation for the expenses and disbursements of each of the respondents in the performance of his duties under the designation of the governor to sit as justices of the General Term for the first department.

The relators are justices of the Supreme Court from judicial districts other than the first, and during the month of January, 1895, they sat as justices of the General Term in the first department.

The presiding justice of the first judicial department certified as to each of the relators that the sum of \$416.66 was a reasonable sum to be paid by the city of New York as compensation for his expenses and disbursements in the performance of his duties under such designation.

This certificate was made pursuant to section 1109 of the

N. Y. Rep.] Opinion of the Court, per BARTLETT, J.

New York City Consolidation Act of 1882, as amended by chapter 104 of the Laws of 1893.

The warrants are withheld upon the ground that the provisions of chapter 104 of the Laws of 1893 are invalid under the Constitution which went into effect on the first of January, 1895.

The statute reads as follows :

"Whenever any justice of the Supreme Court from any judicial district, other than the first judicial district, shall be designated as one of the justices of the General Term in the first judicial department, he shall be paid by the city of New York such sum as shall be certified to be reasonable by the presiding justice of the first judicial department, not exceeding the sum of five thousand dollars in any one year, as compensation for his expenses and disbursements in the performance of his duties under such designation ; and whenever one or more of the said justices shall be duly assigned to hold any other court than the General Term, or perform judicial duties in and for the first judicial district, he shall be paid the sum of ten dollars a day for every day such justice shall sit and perform such judicial duties, including the time necessarily devoted to the examination and decision of cases heard by such court while he may be a member thereof." (Laws of 1893, vol. 1, p. 205.)

The provision of the new Constitution referred to reads as follows :

"The judges and justices hereinbefore mentioned shall receive for their services a compensation established by law, which shall not be increased or diminished during their official terms, except as provided by section 5 of this article." (Constitution of 1894, article 6, section 12.)

Section 5, above referred to, has no bearing upon this matter. The provision of the old Constitution which the above-quoted paragraph supersedes was as follows :

"The judges and justices hereinbefore mentioned shall receive for their services a compensation to be established by law, which shall not be diminished during their official terms."

(Constitution of 1846, article 6, section 14, as amended in 1867.)

The suggestion of counsel that this appeal presents the question of the constitutionality of the act of 1893 under the Constitution which went into effect on the first day of January, 1895, is erroneous.

This act is not in any way affected by the new Constitution, as that instrument has no retroactive effect in this case, and only condemns subsequent legislation that may offend any of its provisions.

We shall, therefore, consider the act of 1893 in the light of the legal conditions existing at the time of its enactment.

It may be observed at the outset that this act is in harmony with the legislative policy of the state existing for many years, to pay to justices of the Supreme Court their expenses and disbursements incurred in the performance of judicial duty when absent from their homes.

The earliest act is chapter 374 of the Laws of 1852, authorizing the chief judge of the Court of Appeals to assign any justices of the Supreme Court to sit in the city of New York and requiring the justice so assigned to render the service.

This was followed by chapter 575 of the Laws of 1855, authorizing the supervisors of New York "to pay such justices so assigned a sum not exceeding ten dollars a day for every day such justice shall sit and perform such judicial duties."

Chapter 414 of the Laws of 1875 extended this provision so as to include the time necessarily devoted to the examination and decision of cases by justices assigned to the General Term.

Chapter 410, Laws of 1882 (the New York City Consolidation Act), reproduced the provision thus amended in section 1109, and this was again amended by chapter 104 of Laws of 1893, now under consideration.

The distinction between compensation for services and compensation for expenses was pointed out by this court in *People ex rel. Bockes v. Wemple* (115 N. Y. 302).

Prior to 1872 justices of the Supreme Court received as compensation for services a certain salary, and in addition a *per diem* allowance of five dollars a day for their reasonable expenses when absent from home and engaged in the performance of judicial duty. (Chap. 408, Laws 1870, § 9.)

The legislature (Chap. 541, Laws 1872, § 1) changed this *per diem* allowance and provided as follows:

"The said justices of the Supreme Court, except in the first judicial district, shall each receive the sum of twelve hundred dollars annually from the first day of January, 1872, in lieu of and in full of all expenses now allowed by law."

The question was, therefore, presented to this court whether Justice BOCKES, who had retired from office before the expiration of his term by reason of having attained the age of seventy years, was entitled to receive from the state, in addition to the original salary of \$6,000, the further sum of \$1,200.

The answer to this question depended upon the fact whether the \$1,200 was to be regarded as a reimbursement of expenses or an increase of salary. This court held to the latter view.

Judge GRAY, delivering the prevailing opinion, says (115 N. Y. 309, 310): "This language (of the act of 1872) is substitutional in its effect. It substitutes an annual grant of money to the incumbent in the place of an allowance for expenses. This, I think, was a clear grant of pay or compensation having no connection with the expenses incurred by a justice. As granted by this act, it became actually and plainly as much a part of the compensation to the justice as though the salary *eo nomine* had been increased to compensate him further for what his office entailed upon him in the way of duties and work. Expenses or no expenses, he became entitled to the whole of the \$1,200."

The \$1,200 was treated as salary because that amount could no longer be regarded as an allowance for expenses, but rather a fixed statutory sum to which the relator was entitled absolutely, without regard to his incurring expenses.

No such situation is presented by chapter 104, Laws of 1893, but, on the contrary, in clear and unmistakable language,

a scheme is created for reimbursing the expenses and disbursements of the justices of the Supreme Court designated to come from other judicial districts and sit in the General Term of the first judicial department.

The mode prescribed for ascertaining from time to time the amount of these expenses and disbursements is judicious and proper.

Only such sums can be paid, within a named limit, as shall be certified to be reasonable by the presiding justice of the first judicial department.

It is true that this provision is subject to the criticism that the presiding justice is not made, in the technical sense, an auditing officer to pass upon actual items of disbursement, but the obvious answer is that it is competent for the legislature to allow its designated representative to certify such reasonable sum as shall be sufficient to reimburse the expenses and disbursements of the justices required to serve in the General Term of the first judicial department.

The act of 1893 is not affected by article 6, section 14 of the Constitution of 1846, as amended in 1867, for the reason that it does not assume to deal with compensation for services, nor does it tend in any way to disturb the policy that seeks to maintain uniformity of salary among judicial officers of the same grade.

The fact that a reasonable gross sum, instead of items, is certified to cover expenses and disbursements does not make it any the less compensation for that purpose, as it is only when these expenses and disbursements have been incurred that the presiding justice will be called upon to act.

We are of the opinion that the act in question is a proper and constitutional exercise of legislative power, and in line with the settled policy of the state and the practical construction given to similar legislation for more than a generation.

The order appealed from should be affirmed, with costs.

All concur.

Order affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
THE MILK EXCHANGE (Limited), Appellant.

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145	267
168	101

In an action brought by the attorney-general to vacate the charter of defendant, a domestic corporation, and to annul its corporate existence, these facts appeared: In defendant's charter the object of its organization was stated to be the "buying and selling of milk at wholesale and retail." A large majority of the stockholders were milk dealers in the city of New York, and creamery or milk commission men in that vicinity. At the first meeting of its board of directors a by-law was adopted declaring that said board "shall have the power to make and fix the standard or market price at which milk shall be purchased by the stockholders of the company." Acting under this by-law the board fixed from time to time the price of milk to be paid by dealers. No milk was purchased by defendant, but it did a commission business, selling milk for farmers to dealers, who would purchase at the price fixed, guaranteeing payment and charging a commission therefor. The prices so fixed largely controlled the market in and about said city. *Held* (PECKHAM, J., dissenting), that the evidence justified a finding that the corporation was a combination inimical to trade and commerce, and so unlawful, and that a judgment granting the relief sought was proper.

Reported below, 77 Hun, 436.

(Argued February 26, 1895; decided March 12, 1895.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made April 24, 1894, which reversed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Circuit and granted a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Alfred Ely for appellant. This is purely a statutory action. (*People v. Miner*, 2 Lans. 396; Code Civ. Pro. §§ 1798, 1983; *People v. N. R. S. R. Co.*, 121 N. Y. 608; *People v. A. A. R. R. Co.*, 125 id. 516, 518; *People v. U. & D. R. R. Co.*, 128 id. 240; *Thompson v. People*, 23 Wend. 384; *People v. Sheldon*, 139 N. Y. 265.) Mere non-user or the omission by a private corporation which discharges no public function and enjoys no exclusive privilege, to act as a corporation or to

transact business is not cause for an action by the People to annul its charter. (*Slee v. Bloom*, 5 Johns. Ch. 376; 19 Johns. 456; *Atty.-Genl. v. Bank of Niagara*, Hopk. 354; *People v. K. & M. T. Co.*, 23 Wend. 193; *People v. N. R. S. Co.*, 121 N. Y. 618; *Skinner v. Smith*, 56 Hun, 449.) An illegal combination in restraint of trade between a corporation and its stockholders collectively, as a class, with reference to the lawful business of the company, is impossible in law. (*Slee v. Bloom*, 19 Johns. 456; *D. M. Co. v. Roeber*, 106 N. Y. 473; *People v. N. R. S. R. Co.*, 121 id. 106; *Leslie v. Lorillard*, 110 id. 531; *Chappel v. Brockway*, 21 Wend. 157; *O. S. N. Co. v. Winson*, 20 Wall. 64; *Marsh v. Russell*, 66 N. Y. 288.) The plaintiff has, however, wholly failed to prove the existence at any time of any illegal agreement or combination as alleged in the complaint. (*S. C. Bank v. Lamb*, 26 Barb. 595; *Bank v. Lanier*, 11 Wall. 369; *Bullard v. Bank*, 18 id. 589; *In re L. I. R. R. Co.*, 19 Wend. 36; *Kent v. Q. M. Co.*, 78 N. Y. 182; *K. & P. R. R. Co. v. Kendall*, 31 Maine, 470; *Dunham v. Rochester*, 5 Cow. 462; *Phelps v. Nowlen*, 72 N. Y. 39; *Kiff v. Youmans*, 86 id. 324; *Clinton v. Myers*, 46 id. 511; *C. B. Co. v. Paige*, 83 id. 178; *Randall v. Hazelton*, 12 Allen, 418.) No overt act of the defendant to effect the object of the alleged agreement is proved. (*People v. Sheldon*, 139 N. Y. 251; *Hutchins v. Hutchins*, 7 Hill, 104; *Wood v. Amory*, 105 N. Y. 278; *Ambler v. Choteau*, 107 U. S. 586; *B. L. O. Co. v. Everest*, 39 Hun, 586.) This action was not brought in the interest of the People, but by and solely in the interest of rival organizations. The state does not concern itself with the quarrels of private litigants. (*People v. N. R. S. R. Co.*, 121 N. Y. 608.)

T. E. Hancock, Attorney-General, for respondents. The direction for non-suit by the trial court was error. A cause of action was clearly proven against defendant for suspension of its business. (Code Civ. Pro. § 1785; *White v. Choteau*, 10 Barb. 208; *Horton v. Morgan*, 19 N. Y. 173; *People v. A. A. R. R. Co.*, 125 id. 517; *People v. U. & D. R. R. Co.*,

128 id. 240.) A ground for forfeiture was established by proof that defendant is doing another business than that which it has authority to perform, and that it has abused and perverted its powers. (Code Civ. Pro. § 1708; *People v. Trustees*, 5 Wend. 211; *Bissell v. R. R. Co.*, 22 N. Y. 285; *People v. U. Ins. Co.*, 15 Johns. 358; *People v. A. & V. R. R. Co.*, 24 N. Y. 261; *People v. Bristol*, 23 Wend. 233; *People v. N. R. S. Co.*, 54 Hun, 375.) The trial court should also have held that, upon the facts proven, this corporation should be dissolved, as tending to create a monopoly in the price, and to control the market for milk. (*Hooker v. Vandewater*, 4 Den. 349; *Stanton v. Allen*, 5 id. 434; *Bank v. King*, 44 N. Y. 87; *Arnot v. P. & E. C. Co.*, 68 id. 558; *People v. Stevens*, 71 id. 545; *People v. N. Y. S. R. Co.*, 54 Hun, 366-380; 121 N. Y. 582; *S. Co. v. Guthrie*, 35 Ohio St. 672; *Craft v. McConoughy*, 79 Ill. 346; *Emery v. O. C. Co.*, 47 Ohio St. 320; *C. G. L. Co. v. P. G. L. Co.*, 121 Ill. 530; *People v. C. G. T. Co.*, 130 id. 268; *People v. K. & M. T. R. Co.*, 23 Wend. 205.) The testimony as a whole tends to show that the object of the defendant was to prevent, as far as possible, competition in the sale of milk, and to fix and control the price thereof. (*People v. Sheldon*, 139 N. Y. 263; *Judd v. Harrington*, Id. 105.)

HAIGHT, J. This action was brought to have the defendant, a domestic corporation, dissolved, its charter vacated and its corporate existence annulled. This relief is sought upon two grounds: *First*, non-user; *second*, an unlawful and illegal combination and conspiracy made in restraint of trade to limit the supply of milk, and to fix and control the price thereof in the city of New York and elsewhere.

The defendant was organized on the 21st day of October, 1882, for the purpose, as stated in its certificate of incorporation, of "buying and selling of milk at wholesale and retail; the purchase of dairies of milk when deemed advisable, and the sale of the same to milk dealers." The complaint charges that the defendant was not engaged in this business. Upon

the trial at the close of the evidence, it was conceded by both counsel for the plaintiff and for the defendant that the question whether the defendant had been engaged in buying or selling milk, under the evidence, was a question of law for the court and not for the jury. We so understand the evidence. There is no conflict, and we have but to ascertain the meaning and intention of the witnesses. The plaintiff's chief witness was Woodhull, the secretary and treasurer of the defendant. In his testimony he makes use of the expression that the exchange "has bought and sold milk;" but he then proceeds to state that he is familiar with the operations of the Milk Exchange in buying milk of the farmers and selling it to dealers, and then states the manner in which the business was conducted. He says: "It is this — a farmer brings his dairy into the exchange to be sold; I go out and find him a dealer who can use the milk, and write the farmer how to mark his milk; I make the collection of the dealer and pay it to the farmer, and we guarantee him the collection." He further testified that their commission was three per cent; that the milk was never shipped to the exchange, but was shipped directly to the dealer; that they sold the milk for the farmer at the exchange price, which they guaranteed to collect and turn over to the farmer, less their commissions. Numerous witnesses speak of their arrangement made, or attempted to be made, with the exchange for the sale of milk, and in each case it was distinctly stated that the exchange did not buy milk; that they merely looked up a dealer who would purchase it at the exchange price, and that they guaranteed the collection for three per cent commission.

We think, therefore, that there can be no question as to the meaning of the witness Woodhull as to the expression made use of by him above referred to, for he immediately proceeded to explain how the milk was purchased and sold, and this evidence establishes the fact that the milk was not purchased by the exchange, but that it was sold in the manner described for the commission stated. The transactions, therefore, constituted a commission business, and were not, strictly speaking,

the "buying and selling of milk at wholesale and retail." Whether the engaging in a commission business, such as we have described, is authorized by the defendant's charter, we do not deem it necessary now to determine. It may be that the commission business is so closely allied to that of buying and selling as to make the former legitimate and permissible under the defendant's certificate of incorporation.

We are thus brought to a consideration of the charge of unlawful conspiracy in restraint of trade. We have only called attention to the charge of non-user for the purpose of showing the precise nature of the business conducted by the defendant, as bearing upon the latter question. If the defendant was the purchaser of milk, or of dairies of milk, it had the right to fix the price from time to time that it would pay therefor. If, however, it was engaged only in the selling of milk upon commission, then its duty as a commission merchant, as ordinarily understood, was to get as high a price for the seller as could be reasonably obtained, and it was no part of its duty to otherwise fix the price of milk.

It appears that the Milk Exchange when organized, or shortly thereafter, had ninety odd stockholders, a large majority of whom were milk dealers in the city of New York or creamery or milk commission men doing business in that vicinity; that at the first meeting of the exchange after its incorporation, the following, among other by-laws, was adopted: "The board of directors shall have the power to make and fix the standard or market price at which milk shall be purchased by the stockholders of this company and to declare the stock of any and every stockholder herein who purchases milk at any other than the price so named by the board, forfeited, subject to the conditions set forth in article 3, sections 4 and 5, of these by laws. All stock so forfeited by said board of directors shall be subject to the order of the board of directors and shall be disposed of as they direct." This by-law remained in force for a number of years and until after there was an investigation as to the character and nature of the defendant's business and a report made by a

committee of the senate. The by-law was then amended by striking out that part thereof which authorized the forfeiture of the stock of a stockholder who purchased milk at another price than that fixed by the exchange. It was again amended in April, 1890, but that part thereof which provided that the board of directors shall have the power to determine and fix from time to time the exchange price of milk was retained. Acting upon these by-laws the defendant's board of directors have from time to time during its corporate existence fixed the price of milk to be paid by dealers, and the prices so fixed have largely controlled the market in and about the city of New York and of the milk-producing territory contiguous thereto.

These facts are significant, and we are unable to escape the conviction that there was a combination on the part of the milk dealers and creamery men in and about the city of New York to fix and control the price that they should pay for milk. Was this lawful?

In *Judd v. Harrington* (139 N. Y. 105) certain parties, who were dealers in sheep and lambs, entered into an agreement, by its terms organizing an association for the declared purpose of guarding and protecting their business interests from loss by unreasonable competition. The agreement was to pool their commissions, except such as should be agreed to be paid to a butchers' association with which they had agreed only to sell to the butchers and the butchers to buy only of the dealers belonging to their respective associations. It was held that the real nature and purpose of the agreement was to suppress competition in an article of food, and to so control the market that they could enhance the price of the article.

In *People v. Sheldon* (139 N. Y. 251) certain coal dealers organized a company known as the "Lockport Coal Exchange." The object of the organization was to prevent competition in the price of coal among the retail dealers in that city by constituting the exchange the sole authority to fix the price which should be charged by the members for coal sold by them. Sheldon and others, members of the exchange,

were indicted, charged with the offense of doing an act injurious to trade or commerce. The trial judge submitted the case to the jury upon the theory that if the defendants entered into the organization for the purpose of controlling the price of coal and managing the business of the sale thereof, so as to prevent competition in the price between the members of the exchange, the agreement was illegal. The jury found the defendants guilty. It was held that the principle upon which the case was submitted to the jury was sanctioned by the authorities. ANDREWS, Ch. J., in delivering the opinion of the court, said: "The question is, was the agreement, in view of what might have been done under it, and the fact that it was an agreement the effect of which was to prevent competition among the coal dealers, one upon which the law fixes the brand of condemnation? It has hitherto been an accepted maxim in political economy that 'competition is the life of trade.' The courts have acted upon and adopted this maxim in passing upon the validity of agreements, the design of which was to prevent competition in trade, and have held such agreements to be invalid." Again he says: "Agreements to prevent competition in trade are, in contemplation of law, injurious to trade, because they are liable to be injuriously used. The present case may be used as an illustration. The price of coal now fixed by the exchange may be reasonable in view of the interests, both of dealers and consumers, but the organization may not always be guided by the principle of absolute justice. * * * If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing."

In *Arnot v. Pittston & Elmira Coal Co.* (68 N. Y. 558) the Butler Colliery Company and the Pittston & Elmira Coal Company were corporations engaged in mining and selling coal. For the purpose of monopolizing the trade and main-

taining a high price for coal, the two companies entered into a contract by which one agreed to take all of the coal which the other should desire to send north of the state line at the regular market price, and agreed not to sell coal to any other party to be shipped in that direction. It was held that the agreement was entered into for the purpose of enhancing the price of coal north of the state line, and that it was against public policy and void. RAPALLO, J., in the opinion, says: "That a combination to effect such a purpose is inimical to the interests of the public, and that all contracts designed to effect such an end are contrary to public policy, and, therefore, illegal, is too well settled by adjudicated cases to be questioned at this day." See *People v. Fisher* (14 Wend. 9); *Hooker and Woodward v. Vanderwater* (4 Denio, 349); *Stanton v. Allen* (5 id. 434); *Saratoga County Bank v. King* (44 N. Y. 87); *Leonard v. Poole* (114 id. 371).

Applying the rule thus established to the evidence under consideration, it appears to us that a case is presented in which the jury might have found that the combination alluded to was inimical to trade and commerce, and, therefore, unlawful.

It may be claimed that the purpose of the combination was to reduce the price of milk, and that it being an article of food such reduction was not against public policy. But the price was fixed for the benefit of the dealers, and not the consumers, and the logical effect upon the trade of so fixing the price by the combination was to paralyze the production and limit the supply, and thus leave the dealers in a position to control the market, and at their option to enhance the price to be paid by the consumers. This brings the case within the condemnation of the authorities to which we have referred.

It is asserted that this litigation was instituted upon the petition of members of the "Milk Producers' Union," and that the purpose of that association was to enhance the price of milk. This may be, but the action was brought by the attorney-general, and the influences that operated upon him to induce his prosecution of the defendant are now unimportant. The questions for our determination are presented by the

pleadings, and the parties have the right to have them determined upon the merits. If the "Milk Producers' Union" is engaged in an unlawful business, which is a restraint upon trade and commerce, it may be dealt with in another action.

The order appealed from should be affirmed and judgment absolute ordered in favor of the plaintiff upon the stipulation, with costs.

All concur (ANDREWS, Ch. J., and BARTLETT, J., on the ground of non-user), except PECKHAM, J., who dissents upon the ground that there was proof sufficient of user, and that the action of the defendant did not fairly tend to enhance the price of milk to the consumer.

Order affirmed and judgment accordingly.

ELIZUR G. WEBSTER et al., Respondents, v. KINGS COUNTY
TRUST COMPANY, Appellant.

As a general rule a contract to convey land free from incumbrance is not satisfied by the tender of a conveyance, subject to unsatisfied and unpaid mortgages, although they are due and payable and the vendee is permitted to deduct from the purchase money the amount of such liens. The vendee, however, may dispense with the duty resting upon the vendor to pay the mortgages and procure their satisfaction, and by his conduct put himself in a position where an allowance out of the purchase money will be all he can equitably demand.

In an action brought to compel specific performance of a contract for the purchase of certain real estate by defendant, situate in the city of Brooklyn, these facts appeared: The premises formerly belonged to a savings bank. In an action brought by the attorney-general in the name of the People to sequester the property of the bank, an order was made without notice to the attorney-general or the depositors, directing the sale of the real estate at public auction, and providing that any of the trustees of the bank might become purchasers at the sale. Plaintiffs, who were such trustees, became the purchasers, received the usual deed and went into possession. After the contract with defendant was executed, an order was made in said action, on motion to the bank and the attorney-general, confirming the sale. Thereafter a depositor applied for leave to intervene in the action, and to have the sale set aside on the ground that the order directing the sale and permitting the trustees to purchase was invalid. The application was heard on the merits

"as fully to all intents and purposes as though the order of confirmation * * * had not been made," and the court decided that the proceedings and sale were valid and binding on all the parties interested, which order was affirmed on appeal (138 N. Y. 658). *Held*, that the decision settled the validity of the title, upon the points involved, as to all the world; also that the bank was not a necessary party to that proceeding.

By the contract the plaintiffs agreed to convey "free from all incumbrances;" at the time of its execution there were mortgages on the premises then due and unsatisfied, and which still remain liens thereon. The deed tendered contained full covenants on the part of the vendors, without mention of the mortgages; there was evidence, however, justifying a finding that the mortgages were kept alive at the instance of defendant, and that it waived a literal performance of the contract in respect to incumbrances. The judgment below permits defendant to deduct from the purchase money the amount of the mortgages, and to accept the conveyance, and enjoins it from asserting that the existence of the mortgages constitutes a breach of said covenant. *Held*, that the judgment was proper.

Defendant objected that the building upon the premises encroaches upon the street line. It appeared that the granite foundation of the water table of the building extends five inches and the door posts one foot three inches outside of the building line, which is the street line. It did not appear that the city authorities consented to this encroachment; but so far as appeared they had not objected thereto. The building had been erected more than twenty years, and by the almost uniform usage in the city in constructing buildings of like character, the water tables and entrances are made to project a little beyond the building line. It also was found that defendant, after making the contract, waived the objection. *Held*, that it was untenable here.

A., one of the original plaintiffs, died after the trial. The deed tendered on the trial, which was duly executed and acknowledged by A. and the other plaintiffs, was placed under the control of the court in the hands of the clerk. *Held*, that the death did not abate the action, nor was it necessary that a new conveyance from his heirs should be procured; that the delivery to the clerk was a good delivery in *escrow*, which was not defeated by the death.

Reported below, 80 Hun, 420.

(Argued February 26, 1895; decided March 12, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made at the July term, 1894, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This action was brought to compel a specific performance by defendant of a contract to purchase certain premises known as the Long Island Savings Bank of Brooklyn, by which contract plaintiffs agreed to convey said premises to defendant by a full covenant warranty deed, free from all incumbrances. Defendant refused to accept a deed on the ground of defect in plaintiffs' title.

The facts, so far as material, are stated in the opinion.

George V. Brower for appellant. The plaintiffs were not seized in fee simple and could not convey by a proper deed of warranty on the 10th day of March, 1893, and protect the purchaser from claims of depositors. (*Girard on Titles*, 284, 285; *Steinberger v. Dickenson*, 9 Barb. 516; *Abbott v. A. R. Co.*, 33 id. 579; *Conger v. Ring*, 11 id. 356; *Jewett v. Miller*, 6 Seld. 402; *Baden v. Storms*, 94 N. Y. 269; *Huebbel v. Newbury*, 53 id. 98; *Hoyle v. P. & M. R. R. Co.*, 54 id. 314; *People v. M. Bank*, 35 Hun, 97; *People v. O. B. S. Brokers*, 92 N. Y. 98; *Munson v. S. G. & C. R. R. Co.*, 103 id. 59; *Schole v. Nichols*, 101 id. 167; *Fulton v. Whitney*, 66 id. 556; *Tory v. Bank of Orleans*, 9 Paige, 661; *Epps v. Van Epps*, Id. 237; *Abbott v. James*, 111 N. Y. 673; *Hayes v. Nourse*, 114 id. 595; *Werz v. Rademacher*, 120 id. 6.) Even if the proceedings were regular and the trustees were seized in fee simple and could convey a valid title free from the trust, the premises were subject to two mortgages on the 10th day of March, 1893, the time fixed for closing the contract. (*Hinckley v. Smith*, 51 N. Y. 21; *Judson v. Wass*, 11 Johns. 525; *Fry on Spec. Perf.* §§ 365-368; *Horanger v. Morris*, 34 Barb. 311.) The judgment as entered in this action is erroneous. (Code Civ. Pro. §§ 758, 762, 764, 765.)

John L. Hill for respondents. Judge LANDON's order of confirmation was clearly right, because the original Savings Bank Act of 1875 (Chap. 371, § 44), which was in force when the People's suit was instituted, is the same, so far as the

question of jurisdiction extends, as the like act of 1882 (Chap. 409, § 278), which was in force when the order of confirmation was made. (*People v. U. S. Inst.*, 64 Hun, 434; 133 N. Y. 689; *In re N. S. Inst.*, 28 N. J. Eq. 552.) The other technical objections to specific performance are of no significance. They were waived, if indeed they ever had any force. (*Johnson v. Oppenheim*, 55 N. Y. 291.) The question is not one of marketable title, but of legal and valid title, which was settled in the special way which the parties agreed upon. (*Baylis v. Steinson*, 23 J. & S. 232.) The consent respecting the street railway motive power is too insignificant to receive discussion. (See Cooley on Const. Law [2d ed.], 354.) The form of the decree was proper, *i. e.*, for balance of purchase money. No other judgment could have been entered on the vendor's suit for specific performance. (2 Abb. New Forms, 901, par. 1741; *Loeber v. Mayor, etc.*, 5 Abb. Pr. 424; 26 Barb. 262; *Leonard v. C. S. N. Co.*, 84 N. Y. 48.)

ANDREWS, Ch. J. (1) The main objection to the title, and the only one originally made, was that the vendors whose title was acquired under the sale at public auction, December 17, 1884, were disabled from purchasing by reason of the fact that they were at the time trustees of the Long Island Savings Bank. The order made in the People's action, November 13, 1877, brought to sequester the property of the savings bank and for the appointment of a receiver, was made after hearing all the parties interested, including the depositors of the bank. That order denied the application for the appointment of a receiver, and permitted the trustees of the bank to remain in control and management of the property of the corporation for the purpose of selling and converting the assets and paying the depositors according to the terms of the order and the proposition of the trustees, to which depositors representing ninety-four per cent of the deposits had consented. The order left the action for sequestration pending and operated to suspend for the time being the taking possession and the administra-

N. Y. Rep.] Opinion of the Court, per ANDREWS, Ch. J.

tion of the assets by the court. From time to time orders were granted by the court upon the application of the bank and its trustees *ex parte*, without notice to the attorney-general or the depositors, extending the time for completing the liquidation. But on the 11th day of October, 1884, the court on the application of the savings bank and the trustees directed that the real estate of the bank should be sold at public auction on giving public notice according to the law and practice of the court respecting judicial sales, on or before December 15, 1884 (subsequently changed to Dec. 17, 1884), and the order declared that "either or any of the parties to the action, or either or any of the trustees of said defendant, the Long Island Savings Bank of Brooklyn, may become a purchaser at such sale." On the sale Webster, Stryker and Agar became the purchasers of the lot on which the bank building was located and received the usual deed and went into possession thereunder, taking the rents and profits, and on the 19th of January, 1893, entered into a contract with the defendant, the Kings County Trust Company, for the sale of the property so purchased by them to that company, the specific performance of which is the subject of this action. No order for the confirmation of the sale of December 17, 1884, was made until May 2, 1893. Upon that day application for confirmation was made by the purchasers to Judge LONDON at Special Term (before whom all the prior proceedings had been taken) on notice to the savings bank and the attorney-general, and the court made an order confirming the sale, reserving the right of any depositor of the bank whose dividends had not been paid pursuant to the terms of settlement, to enforce the liability of the purchasers on their bond filed November 14, 1877. Thereafter on the 17th day of Nov., 1893, one Hanna, a depositor in the savings bank who had received but eighty per cent of his claim, applied to the Special Term in his own behalf and in behalf of all other depositors, for leave to intervene in the People's action and to have the sale of Dec. 17, 1884, and the subsequent proceedings set aside on the ground that the order of Oct. 11, 1884,

directing the sale and permitting the trustees to purchase was invalid. The petition set forth the history of the prior litigation and proceedings and that the several orders were made without notice; that the sale was for an inadequate price; that the trustees were incapacitated from purchasing for themselves, and it alleged circumstances which the petitioner claimed excused *laches* in making the application. The petition with the affidavit and the order to show cause were served on the attorney-general, the attorney who appeared for the savings bank in the action, and on its vice-president. On the matter coming on to be heard before Judge LANDON, May 20, 1893, he heard the application on the merits, "as fully to all intents and purposes, as though the order of confirmation of May 2, 1893, had not been made," and he found that the applicant was not chargeable with *laches* in making his application, and having considered the matters as though presented *de novo*, he decided that the proceedings and sale were valid and binding upon all the parties interested, including the depositors. He made an order denying the application, except that it permitted the petitioner to intervene in the action in behalf of himself and of all other depositors and to appeal from the order of confirmation "with the same force and effect as if he had been allowed to intervene and had actually intervened and appeared and opposed said motion on the merits." From this order of May 20, 1893, Hanna appealed to this court. On the argument the question of the validity of the sale and the right of the trustees to purchase were fully presented, and this court affirmed the order of Judge LANDON (138 N. Y. 658). The question as to the validity of the sale is concluded by the decision on the appeal from the order. The court in affirming the order below necessarily adjudged that the clause in the order of October 11, 1884, permitting the trustees to purchase, was valid, and that the sale was in all respects legal and binding. All the parties interested in the question were before the court in that proceeding, the People, the savings bank, the depositors and the purchasers. The Kings County Savings Bank was

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not a party nor was it necessary that it should have been made a party. The decision bound the title upon the points involved as to all the world. The main objection of the defendant to completing the purchase is, therefore, unfounded.

(2) By the contract the premises were to be conveyed "free from all incumbrance." At the time of the contract there were unsatisfied mortgages on the premises amounting to about \$80,000, which were then due and which still remain liens on the land. The deed of the vendees tendered on the trial contained full covenants on the part of the vendors, making no mention of the mortgages. The judgment permits the defendant to deduct from the purchase money the amount of the mortgages and to accept the conveyance, and enjoins the defendant from asserting that the existence of the mortgages constitutes a breach of the covenants in the deed. We entertain no doubt that in general a contract to convey land free from incumbrance would not be satisfied by a tender of a conveyance subject to unsatisfied and unpaid mortgages, although the purchaser was permitted to deduct an equivalent from the purchase money. The vendor under such a contract cannot impose upon the purchaser the burden of paying the mortgages and procuring their satisfaction, even though the mortgages are presently due and payable. But the purchaser may dispense with this duty resting on the vendor, and by his conduct put himself in a position where an allowance out of the purchase money will be all that he can equitably demand. The evidence in this case justifies the conclusion that the mortgages were kept afoot at the instance of the defendant and that the defendant waived a literal performance of the contract in respect to the incumbrances.

(3) It is objected that the building encroaches upon the street line. There is evidence in the case tending to show that the granite foundation of the water table extends five inches outside of the building line, and that the door posts extend over the building line on Fulton street one foot and three inches. It does not appear whether the city consented to this construction. The building has been erected more than

twenty years, and, so far as appears, neither the municipality nor any of its officers has ever objected to the alleged encroachment. It was shown that the almost uniform usage in Brooklyn in the construction of buildings of like character is to project the water table and the entrance a little beyond the building line. The building in question was located in the vicinity of the most valuable business property in the city. The main building is concededly on the street line. It is quite probable that the building line in this vicinity is distinctly marked by the general situation and the uniformity of location of the main walls of the buildings, and that a purchaser, by observation, without any formal survey, would be able to discover any projection beyond that line. The question may arise whether, under such circumstances, a purchaser, under a contract which describes the premises by metes and bounds, which accurately defines his property, can be excused from performance because of a slight projection of the water table or stoop front of the building beyond the street line, where such projection is visible upon inspection. We need not consider that question now, because we are of the opinion that this very technical objection is answered by the general finding that the purchaser, after the contract, waived all objections to the title, except the main objection first considered, and there is the further technical answer that, in the absence of any statement in the record that it contains all the evidence, we must presume in support of the judgment and findings that there was evidence sufficient to sustain the judgment.

(4) The objection that the closing of the contract was extended only to March 10, 1893, and that the vendors could not give a good title at that time, and that the defendant then formally rejected the title tendered and thereby the contract came to an end, is not well taken. The dealings between the parties after that date clearly show that the declination of the title at that time by the defendant was tentative merely and that both parties proceeded upon the understanding that if the question of the right of the trustees of the savings bank

to purchase should be judicially and affirmatively settled in the contemplated proceedings, the sale would be consummated.

(5) The death of Agar after the trial did not abate the suit, nor was it necessary that a new conveyance of his interest in the property from his heirs should be procured. The deed tendered on the trial and placed under the control of the court in the hands of the clerk, duly executed and acknowledged by Agar and the other plaintiffs, was a good delivery in escrow, which was not defeated by his subsequent death. (*Ruggles v. Lawson*, 13 Jo. 285; *Hunter v. Hunter*, 17 Barb. 25.) The surviving plaintiffs could continue the action in their own names to recover the unpaid purchase money, and on recovery they would hold the share of Agar in trust for his representatives.

We think the judgment is right and it should be affirmed, with costs.

All concur.

Judgment affirmed.

145	288
159	99

CLARA J. BOGART, as Administratrix, etc., Respondent, v.
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD
COMPANY, Appellant.

B., plaintiff's intestate, a fireman upon one of defendant's engines, was killed in consequence of the fall of a bridge on defendant's road. In an action to recover damages these facts appeared: One of the abutments to the bridge, which was built by another railroad corporation, defendant's predecessor, was defective in its original construction. These defects were a foundation upon quicksand, an improper backing of cobble and field stones and the use of poor mortar. None of these defects were visible or capable of detection by ordinary observation. The other abutment had previously developed defects of such a character as to compel its being partially taken down for the purpose of repair. The same defects were discovered in that abutment as were subsequently found to exist in the other. *Held*, that ascertaining defects of construction in one of the abutments would naturally lead a prudent inspector to doubt the safety of the other, both being built by the same contractor and at the same time, and would impel him at least to make some effort to ascertain the truth beyond merely looking at the structure from the outside,

and thus it was a question for the jury whether defendant's duty was fully performed; and that a refusal of the trial court to determine it as matter of law, and a submission thereof to the jury, was not error. Reported below, 72 Hun, 412.

(Argued February 26, 1895; decided March 12, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 3, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed orders denying motions for a new trial.

This action was brought to recover damages for the death of Hoyt M. Bogart, plaintiff's intestate, while in the employ of defendant, a railroad corporation, as a fireman on one of its engines, through an accident which resulted from the carrying away of a bridge on defendant's road.

The complaint alleged that the bridge was constructed in a negligent, faulty and defective manner, and after its construction became defective and unsafe for the passage of trains, and that at the time of the accident it was in such condition, and that prior to the accident defendant had or was chargeable with knowledge thereof.

The facts, so far as material, are stated in the opinion.

John G. Milburn for appellant. The court erred in charging that the jury might find negligence, or predicate any finding of negligence, on the provisions made at this bridge for taking care of the water of the stream. (*Baulec v. R. R. Co.*, 59 N. Y. 356; *Dwight v. L. Ins. Co.*, 103 id. 359.) The court erred in allowing the witnesses Sisson and Miller to testify to statements made by the defendant's witness, Hubbell, against the defendant's objection that Mr. Hubbell's attention was not called to the time and place of the conversation. (*Hart v. H. R. B. Co.*, 84 N. Y. 60; *People v. Weldon*, 111 id. 575; *Ankersmit v. Tuck*, 114 id. 55.)

E. F. Babcock for respondent. The testimony of Sisson and Miller in contradiction of the witness Hubbell was prop-

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Opinion of the Court, per FINCH, J.

erly admitted, and, if otherwise, the error was harmless. (*Rockwell v. Brown*, 36 N. Y. 212; *Sloan v. N. Y. C. R. R. Co.*, 45 id. 127; *Stape v. People*, 85 id. 390; *People v. Austin*, 1 Park. Cr. Rep. 159; *Thell v. Plumb*, 55 N. Y. 270; *Patchin v. Ins. Co.*, 13 id. 270; *Hotchkiss v. Ins. Co.*, 5 Hun, 90, 94; *Shultz v. R. R. Co.*, 89 N. Y. 242; *People v. Schuyler*, 106 id. 306.) The plaintiff's objection to the reading of the testimony of Mylchris and Cleveland, given on a former trial, was properly sustained. (*Wilber v. Sheldon*, 6 Cow. 161; *Powell v. Waters*, 17 Johns. 179; *Weeks v. Lowerre*, 8 Barb. 530; *Creary v. Sprague*, 12 Wend. 45.)

FINCH, J. The most important contention argued on behalf of the appellant arises over the refusal of the trial judge to charge as requested that the defendant should have the verdict if the jury were satisfied that the cause of the accident was the extraordinary flood in some manner destroying the south abutment of the bridge. The train went into the water and the plaintiff's intestate was killed. Since the bridge was constructed by a predecessor company it was conceded that the defendant's liability must rest not upon defects in the original construction, but upon an omission to discover and remedy these defects as the result of a proper system of inspection. It was proved, and the court distinctly charged, that nothing in the appearance of the south abutment indicated defect or danger, or gave any observable warning of the structural weakness in fact existing in that abutment. That weakness was shown to be, by the testimony given for the plaintiff, a foundation upon quicksand, an improper backing of cobble and field stones, and the use of a mortar made of poor sand and containing very little cement. These defects, of course, were not obvious to the eye or capable of detection by ordinary observation. The charge of the court in that respect met with the appellant's approval. But it is claimed that at a later stage of the charge the trial judge became inconsistent and submitted to the jury the question of negligence as to both abutments; and the lan-

guage referred to was this: "So it will be for you to say whether the plaintiff has established here by all the evidence in the case that these abutments were improperly constructed, and if they were improperly constructed, then whether or not the defendant, after it took possession of this road, was guilty of negligence in failing to find out that they were improperly constructed and to see that they were properly constructed." To this portion of the charge there was no exception. It was not inconsistent with or contradictory of what had previously been said as to the south abutment by itself, but left that unchanged and submitted the general question in subordination to the specific charge. But the appellant claims that there was an inconsistency and danger of some misunderstanding. If the learned counsel for the defendant thought that, they should have called the court's attention to its use of the word "abutments" in the plural and asked for a correction, or at least entered an exception. They did neither. All that occurred was this: At the close of the charge "the defendant's counsel excepted to the charge where the jury are allowed to find or predicate any finding of negligence on the provisions made at this bridge for carrying the water through or allowing the water to pass." The evident meaning of this exception was that there was no proof of any insufficiency of the waterway. The court did not say that there was or assume that there was. The judge's charge touched that subject but incidentally in stating the general rule of the bridge builder's duty as affected by the character of the stream. One of the defenses asserted was that the flood which destroyed the bridge was so extraordinary and exceptional that no one was negligent for not anticipating and providing against it. That claim required the court to state the general rule that the builder was bound to anticipate such extraordinary and unusual floods as the character and history of the stream showed might at some time be reasonably expected, and it was in that connection that a sufficient opening was referred to as necessary to be provided.

Following this exception there was a request to charge,

which, in the record, reads thus : " If, under the evidence, the jury shall find that the cause of this accident was this extraordinary flow of water, in some way causing the destruction of the south abutment, that the plaintiff is not entitled to recover." Obviously, the trial court must have understood this request to mean that the flood was so great as to excuse the defendant, no matter from what cause the bridge fell. I should never have suspected any other meaning but for that asserted to have been its purpose on the argument. It is now said that its meaning was to ask a charge that, if the cause of the accident was the fall of the south abutment, then the defendant was not liable. The request was " if the cause of the accident was this extraordinary body of water," and it now becomes, if the cause was the fall of the south abutment. I doubt very much whether we ought to give it the construction claimed for it, but without resting our decision upon that point I am satisfied that the refusal to charge was not error, even upon the appellant's construction, because it was impossible to say, as matter of law, that there was no negligence in the failure to discover the structural defects of the south abutment. The bridge was a single construction, both abutments of which were built at one time, by one contractor, under one superintendence, and with the same material. No inspector of the defendant could or did fail to understand that natural and presumable fact. The north abutment developed defects of such a character as to compel it to be partially taken down for the purpose of repair. Necessarily the workmen of the defendant discovered and knew all about the defects of that construction. They knew that poor mortar was used, crumbling at the touch, and without tenacity or strength. They discovered the backing of cobbles and of stone from the fields and the character of the ground upon which the structure stood. The defendant thus had notice that the north abutment was shabbily and unsafely constructed, and the court was asked to charge, as a matter of law, that with that knowledge they were at liberty to assume that the south abutment, built at the same time and by the same men, was built in a different way and free from the

defects discovered. The court could not say that. The inference, one way or the other, was an inference of fact and not of law. That a railroad company, which is responsible for the lives and safety of its passengers, can ascertain that one abutment of a bridge, which it did not itself construct, is built of imperfect and unsuitable material, with poor mortar and on a bad foundation, and yet may prudently assume that the other abutment is free from these defects, was built differently and more safely because no weakness is visible, and take the chances of results, is a proposition not to be charged as matter of law, and which the common sense of the average man would be likely to reject as an inference of fact. The ascertained defect of the north abutment would lead a prudent inspector to doubt the safety of the other and impel him, at least, to make some effort to ascertain the truth beyond merely looking at the structure from the outside. It was thus a question for the jury whether the duty of the company was fully performed, and whether it was not negligent to trust to appearances in the south abutment, which it knew had proved deceitful for a time in its fellow across the stream.

Other questions argued may be left upon the opinion rendered at the General Term.

The judgment should be affirmed, with costs.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

HANNAH KENNEDY, as Administratrix, etc., Respondent, v.
THE MANHATTAN RAILWAY COMPANY, Appellant.

In an action to recover damages for alleged negligence causing the death of K., plaintiff's intestate, a car cleaner in defendant's employ, these facts appeared: K. was employed in a yard in which trains were switched off to be cleaned, and which was on the same elevation above the street below as defendant's road. The yard was a new uncompleted structure with seven tracks. The plan was to have the spaces between the tracks covered with plank properly laid down and fastened. The platform of the car was over a space where the planks had not been laid. The hole was uncovered, unguarded and unlighted. While engaged in

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167	312
145	288
173	473

the performance of his work, K., in attempting to go from the car to a train on another track, in the night time, stepped backward from the step of the platform of the car, fell through the hole into the street below and was killed. Defendant had been using the yard in an incomplete state for three or four weeks, during which time its carpenters had been constantly employed in covering the spaces between the tracks, two gangs being engaged, working from opposite ends of the yard toward the center, and the place where K. fell was in the space left uncovered when the carpenters quit work on that night. K. had been working in the yard during the whole of this time and was familiar with the fact that the spaces between the tracks were not completely covered. *Held*, that plaintiff was not entitled to recover; that defendant had the right to use the structure and to ask its employees to work therein before it was completely planked over, and if with full knowledge of that fact an employee consented to do his work at that place he assumed the risk consequent thereon, and as the evidence clearly showed such knowledge on the part of K., that a submission of the question to the jury was error.

(Argued February 27, 1895; decided March 12, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 17, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This action was brought to recover damages for the negligent killing of Michael Kennedy, plaintiff's intestate.

The facts, so far as material, are stated in the opinion.

Joseph H. Adams for appellant. The plaintiff's intestate knew that the yard in which he was injured was in an uncompleted condition, and the danger of falling through the structure was one of the risks of his employment assumed by him, and for which the defendant cannot be held liable. (*Arnold v. D. & H. C. Co.*, 125 N. Y. 15; *Gibson v. E. R. Co.*, 63 id. 452; *De Forest v. Jewett*, 88 id. 264; *Hickey v. Taaffe*, 105 id. 36; *Powers v. N. Y., L. E. & W. R. R. Co.*, 98 id. 274; *Shaw v. Sheldon*, 103 id. 667; *Williams v. D., L. & W. R. R. Co.*, 116 id. 628; *Hudson v. O. S. S. Co.*, 110 id. 625; *Hussey v. Coger*, 112 id. 614; *Curran v. W. C. M. Co.*, 36

id. 153; *Stewart v. N. Y., O. & W. R. R. Co.*, 126 id. 631; *White v. W. L. Co.*, 131 id. 631; *Sullivan v. I. M. Co.*, 113 Mass. 396; *Ragon v. T., etc., R. R. Co.*, 97 Mich. 265; *Leary v. B., etc., R. R. Co.*, 139 Mass. 580; *Buzzell v. L., etc., Co.*, 77 Am. Dec. 212; *Hayden v. S. M. Co.*, 29 Conn. 548; *Clark v. Holmes*, 7 H. & N. 937.) The plaintiff failed to establish her contention that the defendant was guilty of negligence in failing to provide her intestate with a reasonably safe place in which to perform his work. (*Burke v. Witherbee*, 98 N. Y. 563; *Sweeney v. B. & J. E. Co.*, 101 id. 523; *Bajus v. S. B. & N. Y. R. R. Co.*, 103 id. 312; *Hickey v. Taaffe*, 105 id. 26; *Dobbins v. Brown*, 119 id. 188; *Berrigan v. N. Y., L. E. & W. R. R. Co.*, 131 id. 582; *Gibson v. E. R. R. Co.*, 63 id. 449; *Crispin v. Babbitt*, 81 id. 516; *Stringham v. Hilton*, 111 id. 188; *Naylor v. C. & N. W. R. Co.*, 53 Wis. 661; *Stephenson v. Duncan*, 73 id. 406; *Gilbert v. Guild*, 144 Mass. 601; *Sullivan v. I. M. Co.*, 113 Mass. 398.) The plaintiff failed to establish an indispensable element in her case, namely, that her intestate himself was free from negligence contributing to his injury. This fact precludes her recovery. (*Cordell v. N. Y. C. & H. R. R. Co.*, 75 N. Y. 330; *Solomon v. M. R. Co.*, 103 id. 437; *Dubois v. City of Kingston*, 102 id. 219; *Palmer v. P. Co.*, 111 id. 488; *Tollman v. S., etc., R. R. Co.*, 98 id. 199; *Reynolds v. N. Y. C., etc., R. R. Co.*, 58 id. 248; *Hale v. Smith*, 78 id. 483; *Arnold v. D. & H. C. Co.*, 16 N. Y. S. R. 310; *Eades v. Clark*, 23 J. & S. 132.) The law looks to the direct or proximate cause and not to the intervening or remote cause. The proximate cause of the injury was the negligence of her intestate, and hence plaintiff should have been nonsuited. (*Ins. Co. v. Tweed*, 7 Wall. 44; *Wilds v. H. R. R. Co.*, 24 N. Y. 438; *Dwight v. G. L. Ins. Co.*, 103 id. 359; *Ryan v. M. R. Co.*, 121 id. 133; *Searles v. M. R. Co.*, 101 id. 662; *Taylor v. City of Yonkers*, 105 id. 209; *Kaveny v. City of Troy*, 108 id. 577.) The learned trial judge erred in refusing to charge the jury the propositions, as requested by the defendant, in regard to the duty

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which the defendant owed to the plaintiff to warn him of dangers. (*Taaffe v. Hickey*, 105 N. Y. 36; *Palmer v. P. Co.*, 111 id. 488; *Coleman v. People*, 58 id. 561, 562; *Vandervoort v. Gould*, 36 id. 639, at 644; *People v. Gonzales*, 38 id. 59; *Haring v. N. Y. & E. R. R. Co.*, 13 Barb. 15; *Suydam v. G. S. R. R. Co.*, 41 id. 380.)

David Leventritt for respondent. The defendant clearly failed in its duty to provide and maintain a reasonably safe structure on which deceased might prosecute his labors. Its negligence was gross, because it knew of the danger and failed to adopt the simplest expedient to remedy it. (*Pantzar v. T. F. I. M. Co.*, 99 N. Y. 372; *Stephens v. H. V. K. Co.*, 69 Hun, 375; 143 N. Y. 633; *Freeman v. P. M. Co.*, 15 N. Y. Supp. 657; *Hawley v. N. C. R. Co.*, 82 N. Y. 370; *Sode-man v. T. T. S. & I. Co.*, 53 N. Y. S. R. 678; *Racine v. N. Y. C. & H. R. R. Co.*, 53 id. 680; *McLean v. S. O. Co.*, 50 id. 626.) Assuming that the yard was an incomplete structure in premature use, the decedent assumed only those perils that were necessarily attendant upon such condition, and the defendant was not thereby relieved of all liability for its failure to make the structure as reasonably safe as its unfinished condition would permit of. (*Pantzar v. T. F. I. M. Co.*, 99 N. Y. 368; *Booth v. B. & A. R. R. Co.*, 73 id. 38.) The exceptions to the refusals to charge on the subject of warnings have no merit. (*Raymond v. Richmond*, 88 N. Y. 671; *Tucker v. Ely*, 37 Hun, 565; *Palmer v. Dearing*, 93 N. Y. 10; *Wallace v. C. V. R. R. Co.*, 138 id. 302.)

PECKHAM, J. The plaintiff's intestate, Michael Kennedy, was one of the cleaners of defendant's cars at the northern terminus of its road. On the 24th of January, 1887, he fell from defendant's yard, located between 144th and 145th streets and Seventh and Eighth avenues in the city of New York, and received injuries from which he died. The plaintiff claims that the accident was occasioned solely by the defendant's negligence in failing to provide and maintain for the

deceased when in its service a safe and suitable structure upon which to prosecute his work. The yard spoken of was on a level with the main road of the defendant and was elevated quite a number of feet above the grade of the street below. Trains were switched off from the main road to this yard to be cleaned, repaired and otherwise provided for. Kennedy's duties as a car cleaner required him to work upon this elevated yard as well as upon the main line, and he had been in the employment of the defendant for about two years. This yard embraced seven tracks, running parallel with each other from Seventh avenue and connected with the main road on Eighth avenue. Between these tracks and parallel with them provision was made for plank roads or walks which would furnish defendant's servants with means for walking about the structure, and upon which the men at work would pass from car to car in the prosecution of their labors. The plank had not all been laid at the time of the accident. Upon the day in question Kennedy went to work at about seven o'clock P. M. There were seven trains with five cars to each train stationed in the new yard when he arrived there, and it was his duty, in connection with fellow-laborers, to go upon the yard that night for the purpose of cleaning these cars. There were five car cleaners at work that night, three of whom, among them the deceased, were at work on a train on the third track. They finished cleaning the first train about nine o'clock, and were getting out of it in the course of proceeding to the next train when the accident occurred. Kennedy and his companion White stepped out on the platform of the car nearest to the train which they intended to go to, and which was close to them on the Seventh avenue side, and Kennedy going first on the platform of the car caught hold of the handle on the platform and put his foot on the step, with his back towards the outside, and when he stepped back he dropped down through an opening in the plank below. This hole was uncovered, unguarded and unlighted. It extended six or eight feet long and three or four feet wide, and commenced right outside of the platform of the car, so that where the platform of the car

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ended the hole below it began, and it was impossible for any one stepping down from the car step to find a footing, except by stepping underneath the car platform. This new yard, so-called, was an uncompleted structure. The defendant had been using it for three or four weeks, and when they commenced to use it it was in a very incomplete state, so far as the covering between the tracks was concerned. During that period and down to the time of the happening of the accident the defendant had its carpenters constantly employed in bringing the yard towards a completed state in the way of covering over the spaces between the tracks with planks, properly laid down and fastened. The work had not been completed, but was in the course of completion when the defendant commenced to use the yard, and during the three or four weeks which had elapsed from the time when they commenced to use it this work had been going on, and the spaces between the tracks had not yet been entirely covered. Kennedy had been working at the place during the whole of this time, and was necessarily familiar with the fact that the yard was not yet properly or completely covered with all the planks which it was the obvious intention of the defendant to place there. This clearly and unquestionably appears from the evidence of plaintiff's own witnesses.

The hole through which Kennedy fell was not a hole in a completed structure, carelessly left uncovered. Two gangs of carpenters had commenced to plank at the different ends of the yard, and were gradually working towards each other, and the space in question was the distance between them at this place as they left off work that night. As the witness White says, there were in other portions of the yard holes, meaning simply the fact that the carpenters had not yet completed the work which they were employed to do, and, hence, various places were still left uncovered at the time of the happening of this accident. The witness Cochran said that he knew that this was a new yard, and that they had been building it for some time; he knew that it was not completed at that time. In explaining the question of the covering of the structure

one of the witnesses for the defendant said: "During all this time, from the time they began to work on the new structure there at the new yard to the time when Kennedy fell through, the carpenters had been at work covering the structure, advancing more day by day in covering it up entirely, working from both ends." And "Kennedy had been working there for some time previous to the accident; he was watchman for the week previous to that." This was simply corroborative of the plaintiff's evidence.

There was some evidence of a warning having been given to car cleaners on several nights before this occurrence to be careful on account of the condition of the yard, but I do not think that it was proved to have been given deceased with sufficient clearness to admit of the statement that it was shown beyond dispute. Actual knowledge of the facts by deceased cannot be doubted. It appears from the evidence beyond any contradiction or dispute that the structure was new and uncompleted, and, in that respect, dangerous for those who did not exercise particular care in regard to walking about the yard. The learned judge who tried the case at Circuit apprehended with perfect clearness the law applicable to this case. He charged the jury that the defendant had the right to use this structure in the condition it was before the planking was completed, and that it had the right to say: "We propose to use these tracks now, although we have not completed them," and if an employee then goes upon the structure to work with his eyes open and in possession of all his faculties and understands the situation, the law says that he does it at his own risk and cannot recover. And upon the request of the defendant's counsel the court also stated that if the deceased knew that the yard was in an unfinished state and that it was uncovered in places, and that it was in the course of being covered, he assumed by continuing in the employment the risk of falling through these uncovered places. We think this a perfectly correct statement of the law applicable to a case of this kind. The defendant had the right to use that structure before it was completely planked

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over. It could ask its employees to continue their work of cleaning its cars at that yard before the planking was completed, and if with full knowledge of that fact the employees should consent to do the work at that place they would assume the risk consequent thereon. But the learned judge left it to the jury to decide the question whether the deceased was notified of the condition of the yard or whether he had acquired knowledge thereof so that he perfectly understood its condition before going to work. We have carefully read over all the testimony in the case, and we have come to the conclusion that the evidence showed beyond any doubt that the deceased was fully aware of the general condition of this yard at the time when he went on duty on the night in question. He had been there daily for more than three weeks, and had been watchman at times, and at times a car cleaner. He was necessarily familiar with the locality, with the fact that the yard was not completed, with the fact that the carpenters were at work daily and with the fact that the planking did not entirely cover the yard. Knowing these facts, he must be held to have assumed the risks which accompanied such situation, and that he did know these facts we think there is no possible room for doubt. It was not a question to be submitted to the jury. Under these circumstances, when he went out from the car and turned his face towards the inside of the car platform and stepped off from the car backwards without looking where he was to land, we can only see a most sad and unfortunate accident for which the defendant, within acknowledged principles of law, cannot be held liable.

We think the judgment should, therefore, be reversed and a new trial granted, with costs to abide the event.

All concur, except ANDREWS, Ch. J., and O'BRIEN, J., dissenting.

Judgment reversed.

NELLIE SISCO, as Administratrix, etc., Respondent, v. THE
LEHIGH AND HUDSON RIVER RAILWAY COMPANY, Appellant.

An employer does not undertake with his employee to use the very best appliances, nor is he called upon to discard machinery reasonably suited for his business, although there may be other and safer machinery; at least when the appliances and machinery used by him are in common use in the business; he is simply bound to exercise reasonable care in providing machinery and appliances in view of all the circumstances. S., plaintiff's intestate, a brakeman in defendant's employ, while climbing up a ladder on the outside of one of the cars of a moving freight train, for the purpose of setting a brake, came into collision with the stationary arm of a mail crane and was seriously injured. The crane had been erected by defendant about two months before, pursuant to directions of the U. S. mail authorities. In an action to recover damages, negligence on the part of defendant was claimed in placing the crane too near the tracks. These facts appeared: Defendant had erected two other mail cranes on its road four years before, identical in construction and in relative location to the tracks with the one in question, and these had been in use since that time. Defendant constructed them from plans recommended by the "Railroad Gazette." The same kind of cranes were used on some of the more extensive lines of railroad and were located no further from the tracks. Other railroads used cranes with movable arms, which rose or fell automatically when not kept extended by the weight of mail bags. Evidence was given, which was undisputed, that the cranes with stationary arms were preferable to those with movable arms, as the former permitted greater space between the end of the arm and the sides of passing cars. There was no evidence that the crane in question was placed nearer the track than cranes on other roads, or that it was practicable to place one at a greater distance and have it answer the purpose. *Held*, that there was no evidence authorizing the submission to the jury of the question of negligence in the location of the crane; and so, that such submission was error; that to charge defendant it was not sufficient to show the injury, or that operating the device used involved danger to the brakeman; that G. took the risks of all constructions necessary and reasonably adapted to the business, and it devolved upon plaintiff to show that the appliance was improperly constructed or located.

Sisco v. L. & H. R. R. Co. (75 Hun, 582), reversed.

(Argued February 28, 1895; decided March 12, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department entered upon an order made February 12, 1894, which affirmed a judgment in

favor of plaintiff and also affirmed an order denying a motion for a new trial.

This action was brought to recover damages for injuries received by Eugene Sisco, the original plaintiff, while in the employ of defendant, a railroad corporation, alleged to have been caused by defendant's negligence.

The facts, so far as material, are stated in the opinion.

Isaac H. Maynard for appellant. The trial court erred in submitting to the jury the question as to whether the defendant was not negligent in putting the mail crane so close to the road. There was not sufficient evidence in the case upon which negligence in this respect could be predicated or inferred. (*Dobbins v. Brown*, 119 N. Y. 188; *Reichel v. N. Y. C. & H. R. R. Co.*, 130 id. 682.) The trial judge erred in holding that it was a question of fact for the jury, whether the defendant was not negligent in failing to give reasonable warning to its employees of the presence of the mail crane, so that they might guard against the danger. (*Lovejoy v. B. & L. R. R. Co.*, 125 Mass. 79; *Bellows v. P. & N. Y. C. & R. Co.*, 157 Penn. St. 51; *Kern v. D. C. & S. R. Co.*, 125 N. Y. 50; *Crown v. Orr*, 140 id. 450.) The judgment cannot be upheld upon the ground of any alleged negligence upon the part of the defendant in making use of the particular kind of a mail crane which it did. (*France v. N. Y., L. E. & W. R. R. Co.*, 143 N. Y. 182; *Flinn v. N. Y. C. & H. R. R. Co.*, 142 id. 11; *Williams v. D., L. & W. R. R. Co.*, 106 id. 634; *Gibson v. E. R. Co.*, 63 id. 450.)

John W. Lyon for respondent. As to defendant's motion for a non-suit on the ground that there is no evidence of negligence on the part of the defendant, it is urged that defendant's negligence was of the most glaring and culpable nature. (*Plank v. N. Y. C. & H. R. R. Co.*, 60 N. Y. 607; *Fredenburgh v. N. C. R. Co.*, 114 id. 582; *Palmer v. D. & H. C. Co.*, 120 id. 110; *Donnegan v. Erhardt*, 119 id. 468; *Wallace v. C. V. R. R. Co.*, 138 id. 302; *Meeks v. N. Y. C.*

R. R. Co., 69 Hun, 488; 140 N. Y. 622.) The second ground stated in defendant's motion for a non-suit as to risk assumed by plaintiff is untenable. (*Kain v. Smith*, 89 N. Y. 375; *Mehan v. R. R. Co.*, 73 id. 585; *Pantzar v. T. F. I. M. Co.*, 99 id. 368; *Buckley v. R. R. Co.*, 117 id. 645; *McGovern v. C. V. R. R. Co.*, 123 id. 280; *Wallace v. R. R. Co.*, 138 id. 302; *Meeks v. N. Y. C. & H. R. R. R. Co.*, 69 Hun, 488; 140 N. Y. 622; *Davidson v. Cornell*, 132 id. 228.)

ANDREWS, Ch. J. The original plaintiff, Eugene Sisco, on the 18th day of April, 1890, in the performance of his duty as brakeman on a moving freight train of the defendant near Monroe station, was climbing up a ladder on the outside of a box car to set a brake, and while on the ladder his head came into collision with the stationary arm of a mail crane, which had been erected by the defendant at that point March 31, 1890, pursuant to the directions of the United States mail authorities. He was seriously injured and brought this action in his lifetime against the defendant to recover damages for the injury, and in his complaint, among other things, he specified as a ground of liability the want of proper care on the part of the defendant in maintaining the obstruction by which he was injured in "such close proximity to its said railroad." The defendant put the allegations of the complaint in issue, and the case was tried before a jury, who awarded \$8,000 damages. The General Term affirmed the judgment entered on the verdict, and from the judgment of affirmance this appeal is taken. The original plaintiff has died since the appeal, and his administratrix has been substituted as plaintiff in the action. The trial judge, upon the issue of the defendant's negligence, submitted to the jury two questions: *First*, whether it was negligent in placing the mail crane too near the track of the railroad, or, *second*, in failing to give reasonable warning to its employees of its presence, so that they might guard against the danger, and instructed them in substance that if they found against the defendant on either

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of these questions the plaintiff, in the absence of contributory negligence, would be entitled to a verdict. It is urged on the part of the appellant that the court erred in submitting to the jury the question whether the defendant was negligent in putting the mail crane so close to the railroad. If this point is well taken it will be unnecessary to consider the question whether negligence could be imputed to the defendant by reason of its failure to notify its employees of the erection of the crane, it having been erected only a short time before the injury in question. The jury found a general verdict, and as it may have proceeded exclusively upon the ground of a negligent location of the crane, if that question ought not to have gone to the jury, the exception to its submission requires a reversal of the judgment.

The mail crane is an appliance to facilitate the taking into a mail car of mail bags when the car is in motion. The defendant erected two on the line of its railroad in 1886, which have been in use since that time, identical in construction, and in relative location to the track, as the one in question. The structure consists of an upright post eleven feet in height above the ground, and standing seven feet six inches from the nearest rail, with a movable arm in the middle and a stationary arm at the top, three feet six inches long, extending towards the track. When a car is passing there is a space of about twelve inches between the end of the arms and the side of the car. The method of operation is to suspend the mail bag between the upper and lower arms. In the mail car is a lever or arm having a sweep (as near as can be collected from the diagram) of a little more than three feet, which the mail agent puts out when approaching a mail crane, and it strikes the mail pouch suspended on the crane and draws it into the car. This device may be operated when a train is moving at great speed. Evidence was given on the part of the plaintiff that on the Erie, New York Central and some other roads mail cranes were used, constructed with a movable arm at the top, which, when not kept extended by the weight of the mail bag, rose or fell automatically. On the part of the defendant

it was shown that mail cranes like those used by the defendant were in use on the Union Pacific and other extensive lines of railroad, and the master mechanic of the defendant testified, without contradiction, there being no other evidence on the point, that mail cranes with the stationary arms were preferable to those with the movable arms, on the ground that the former permitted a greater space between the end of the arm and the side of the car than those of the other construction. There was no evidence that the crane in question was placed nearer the track than cranes upon other roads, nor that it was practicable to place a crane at a greater distance than was the one in question, or to construct it with a shorter arm and have it answer the purpose in view. There was affirmative evidence as to the location of cranes on other roads, and in all the cases referred to it was shown that they were located no further from the track than the cranes erected by the defendant, and that the space between the end of the arm and the side of the passing car was no greater. It was shown that in constructing the cranes the defendant adopted plans recommended by the "Railroad Gazette," diagrams of which were introduced in evidence.

Upon the state of the proof we think there was no evidence authorizing the submission to the jury of the question of negligence of the defendant in the location of the cranes. The court eliminated the point whether the defendant should have adopted the crane with the movable arm, and very properly. The employer does not undertake with the employee that he will use the very best appliances, nor is he called upon to discard machinery adopted by him in his business reasonably suited therefor, although there may be other machinery that may be safer. It is bound to the exercise of reasonable care in providing machinery and appliances, in view of all the circumstances. Still less is the master to be cast in damages for error of judgment in selecting one method of prosecuting his business, or one kind of machinery or appliance, on proof that another method or appliance is better or safer when both methods or both kinds of appliances are in common use. (*Frace*

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v. *R. R. Co.*, 143 N. Y. 182; *Flinn v. R. R. Co.*, 142 id. 11.) It was not found, nor was there any evidence upon which a jury could infer, that the crane in question could be placed any further from the track than it was and perform the function for which it was designed. The plaintiff was bound to show a state of facts indicating negligent construction or location, to raise a question for the jury upon this point. It was not sufficient for him to show an injury, or that operating the device involved danger to the brakemen. He took the risk of all constructions necessary and reasonably adapted to the business of the railroad. The burden was upon him to show that the appliance, concededly useful in the business of the defendant, was improperly constructed or located, and this he wholly failed to do. Proof that it was dangerous was not enough. He was bound to go further and show that the defendant might, by the use of reasonable care, have accomplished its purpose and at the same time protected its employees from the danger.

We think the judgment cannot be sustained without establishing a principle which will subject an employer to liability to his employees from the mere happening of an injury while engaged in a dangerous service.

The judgment should be reversed and a new trial ordered.

All concur.

Judgment reversed.

JAMES WALSH, an Infant, etc., Respondent, v. THE FITCHBURG RAILROAD COMPANY, Appellant.

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Defendant owned a plot of ground in the city of T. on which were railroad tracks and a turntable, built in the usual manner and in good repair, with its platform elevated above the surface of the ground; the only way to approach it on a level was by means of the tracks. A portion of the premises was unfenced, and the public had for a number of years been accustomed to cross the lot from one street to another. The foot path thus worn ran within fifteen or twenty feet of the turntable. Plaintiff, a child five years and nine months old, went upon said plot, and, in company with other boys, was playing upon the turntable; in turning it around, his leg was caught between the rail on the table

and that of a track leading to it, and he was injured. In an action to recover damages it appeared that while turntables might be so fastened when not in use as that people could not turn them, they were not usually so constructed. *Held*, that the facts did not authorize an assumption that the public had been invited to come upon the ground, and while there was an implied license permitting the crossing, one availing himself of it was there by sufferance only, and while defendant owed to him a duty not to injure him either intentionally or by a failure to exercise reasonable care, it owed to him no duty of active vigilance; that the facts did not show a failure to exercise such reasonable care in the management of its business with regard to the turntable, or a violation of any duty defendant owed to plaintiff; that defendant did not owe a duty to the public or the plaintiff to keep the turntable fastened when not in use; and so, that a submission of the question to the jury was error.

R. R. Co. v. Stout (17 Wall. 657); *Koons v. S. L. & I. M. R. R. Co.* (65 Mo. 592); *K. C. R. Co. v. Fitzsimmons* (22 Kans. 86); *S. C.* (31 Am. Rep. 203); *Barrett v. S. P. Co.* (91 Cal. 296), disapproved.

Bird v. Holbrook (4 Bing. 628; 15 Eng. Com. Law, 91); *Townsend v. Wathen* (9 East, 277); *Clark v. Chambers* (L. R. [3 Q. B. Div.] 827); *Lynch v. Nurdin* (1 Adol. & El. [N. R.] 29); *S. C.* (41 Eng. Com. Law, 422), distinguished

Walsh v. Fitchburg R. Co. (78 Hun, 1), reversed.

(Argued February 28, 1895; decided March 12, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 8, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict and also affirmed an order denying a motion for a new trial.

This action was brought to recover damages for injuries received by plaintiff while upon the premises of defendant, a railroad corporation, through the alleged negligence of the latter.

The facts, so far as material, are stated in the opinion.

T. F. Hamilton for appellant. Plaintiff should have been non-suited. (*McAlpin v. Powell*, 70 N. Y. 126; *Lamore v. C. P. I. Co.*, 101 id. 391; *Cox v. N. Y. & H. R. R. Co.*, 11 Hun, 621.) Even if the public passed over a footpath near this turntable with the knowledge of the railroad company, and pedestrians passed along this pathway as mere licensees,

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the railroad owed such passers only the duty to do them no intentional harm, and no burden of active vigilance was cast upon the defendant. (*Nicholson v. E. R. R. Co.*, 41 N. Y. 531; *Sutton v. N. Y. C. & H. R. R. Co.*, 66 id. 243.)

Henry T. Nason for respondent. If the turntable in question was a dangerous piece of machinery, attractive to children, who with the knowledge and permission of the officers and servants of the railroad company were in the habit of frequenting these premises, and of being on and about this turntable, then it was the duty of the defendant either to warn or forbid these children from going on the turntable, or else to take some precaution in their management of the turntable to prevent the occurrence of such an injury as the one complained of here. (*Townsend v. Wather*, 9 East, 277; *Bird v. Holbrook*, 4 Bing. 628; *Whirley v. Whitman*, 1 Head, 610; *Birge v. Gardner*, 17 Conn. 507; *Hydraulic Works Co. v. Orr*, 83 Penn. St. 332; *Loomis v. Terry*, 17 Wend. 496; *Keffe v. M., etc., R. R. Co.*, 21 Minn. 207; *G., etc., R. Co. v. Stryon*, 66 Tex. 421; *Bridge v. A., etc., R. Co.*, 27 S. C. 456; *Ferguson v. C., etc., R. Co.*, 77 Ga. 102; *U. P. R. Co. v. Dun*, 37 Kans. 1; *Early v. L. S., etc., R. Co.*, 66 Mich. 379; *O'Mally v. S. P., etc., R. Co.*, 43 Minn. 289; *I. R. Co. v. Herrick*, 1 Wash. St. 446; *Koons v. S. L., etc., R. Co.*, 65 Mo. 592.) The plaintiff in this case does not stand before the court in the light of a trespasser, but as a person who has come upon the defendant's premises at their express invitation, and the degree of care required of the defendant must be measured accordingly (*Lynch v. Nurdin*, L. R. [12 Q. B.] 29; *Clark v. Chambers*, L. R. [32 Q. B. Div.] 327; *Man-gam v. B. R. R. Co.*, 38 N. Y. 455; *Thurber v. H. B. M. & F. R. R. Co.*, 60 id. 326.) No negligence can be imputed to the plaintiff, he being *non sui juris*. (*Kunz v. City of Troy*, 104 N. Y. 344; *McGary v. Loomis*, 63 id. 104; *Man-gam v. B. R. R. Co.*, 38 id. 455.) There was no negligence on the part of the plaintiff's parents or guardians which can be imputed to the child. (*Birkett v. K. Ice Co.*, 110 N. Y.

504; *Mangam v. B. R. R. Co.*, 38 id. 455; *Oldfield v. N. Y. C. & H. R. R. Co.*, 14 id. 310.) The question of excessive damages will not be considered here, as it is not the province of this court to interfere with the judgment on that ground. (*Oldfield v. N. Y. & H. R. R. Co.*, 14 N. Y. 319; *Ihl v. F. S. S. R. Co.*, 47 id. 321; *Gale v. N. Y. C. & H. R. R. Co.*, 76 id. 594; *Maher v. C. P., N. & E. R. R. Co.*, 67 id. 66; *Link v. Sheldon*, 136 id. 5.)

PECKHAM, J. The defendant owned a plot of ground in the northern portion of the city of Troy, bounded by four different streets. Quite a large portion of its land was unfenced and the public had for a number of years been accustomed to walk across this plot for the purpose of shortening the distance, instead of going around by the public streets. The land was approached from the north on the same grade as the public street and the defendant laid its tracks through the street and on to the plot for the purpose of using it in the ordinary transaction of its business. It was not used for the purpose of a depot and the land itself was rough, uneven, overgrown with weeds and grass and not fit for use by horses and wagons and was not so used. The public were not invited upon the land in any sense further than that the defendant had not taken occasion to prevent the public from using a portion of it as a footpath for the purpose already stated. The footpath thus marked out by use ran within fifteen or twenty feet of the turntable of the defendant, which was used by it in the ordinary course of its business. The surface of the table was in some places about three feet above the grade of the plot and at others it was eight or nine feet above grade. The only way to approach it on the level was by the use of the tracks of the defendant which led on to the table and it was used for the purpose of taking the defendant's engines and turning them around. The turntable was built in the usual manner and was in perfect repair. The main tracks of the defendant ran through the eastern portion of the plot. The turntable was west of the main tracks.

On the 31st of August, 1888, the plaintiff, who was at that time a child of the age of five years and nine months, had come upon the defendant's premises, and, in company with several other and older boys, was playing on the turntable, and, in the course of turning the table around, the plaintiff had his leg caught between the rail on the table and the rail on the adjoining earth and he was severely injured. This action has been brought for the purpose of recovering damages for those injuries, and a recovery has been had which has been sustained by the General Term.

Plaintiff bases his right to maintain this action upon the allegation that the defendant, by permitting the public to go upon its land in the manner stated, had in effect invited such entrance, and was bound on that account to use greater care to prevent an accident of this nature.

A further ground is stated that, in using the turntable, even upon its own property, under circumstances which rendered it probable that children would come upon the land and play upon the turntable, it was bound to the exercise of greater care than it had observed; that it was bound to guard the table in such a way that children could not come upon it, or to station a man there to prevent their entrance, or else the defendant should have used some kind of a device which would or might prevent the turning of the table while it was not in use by defendant. The defendant contends that the plaintiff had not been invited to come upon its grounds, either expressly or by any implication arising from its conduct in simply permitting the public to cross a portion of its grounds as a short cut between two streets, and that it was not bound to any active vigilance in the matter, and was only bound to such reasonable care and caution as any one ought to take to prevent injury to another, and that, guided by that rule, it had not, as matter of law, been guilty of any negligence.

As to the assumed invitation held out to the public, there is nothing in the facts found in this record which justifies any such assumption. The plaintiff was not on the land by invitation of the defendant nor in its business, but for his own pur-

poses totally disconnected with the defendant's business. He was not a trespasser in the sense of his being unlawfully upon the premises, because the defendant, by its course of conduct, had impliedly granted a license to the public to use the land for the purpose above mentioned. This license, of course, could at any time have been revoked, and then any one going upon the land would have been a trespasser. But under the circumstances, treating the plaintiff as an adult, and simply upon the question of the invitation held out to him, he was there by sufferance only. The defendant had no right intentionally to injure him, and it would be liable if it heedlessly or carelessly injured him while performing its own business. It owed him a duty to abstain from injuring him either intentionally or by failing to exercise reasonable care, but it did not owe him the duty of active vigilance to see that he was not injured while upon its land merely by permission for his own convenience. (*Nicholson v. Erie R'way Co.*, 41 N. Y. 525; *Byrne v. Railroad Co.*, 104 id. 363; *Splittorf v. State of New York*, 108 id. 205; *Cusick v. Adams*, 115 id. 55.) We think there is no proof whatever that the defendant, so far as its duty to plaintiff is concerned, failed to exercise reasonable care in the conduct of its business with regard to this machine.

We are of the opinion that the defendant has not been shown guilty of a violation of its duty, nor has a question been made for the jury in that respect by proof that it used the turntable in the manner it did. It is true that some means might have been adopted which possibly might have prevented the happening of this accident. The proof is that turntables are not generally constructed with bolts for the purpose of keeping them steady. Such bolts do not come with the table from the factory. Nothing of that kind is essential to the machine or for its legitimate and proper use. The table might have been kept so fastened or locked when not in use that people could not turn it without unfastening or unlocking it, and the defendant might even have built a wall around it so high and guarded it so closely as to prevent any access to it

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by children at any time. But was defendant bound to do so? Did it owe any such duty to the public or to this plaintiff? The turntable was on its own land; it was used by the defendant for the sole purpose of properly conducting its own business; it was a fit and proper machine for that purpose; it was not of the nature of a trap for the unwary; it was not built in any improper or negligent way with reference to the transaction of the business of the defendant. What further duty did it owe to those who had no business upon its land, who came there unasked and whose presence was simply tolerated?

Upon the question of alluring plaintiff, we do not think it can be correctly said defendant either enticed or allured him to come upon its land.

The whole case in this aspect rests upon the doctrine that the turntable was, as to children of tender years, a dangerous and at the same time an enticing machine, one which, when seen, would inevitably and infallibly allure children to come upon it for the purpose of playing upon it, and that the natural and probable result of such play would be the injury of the child. Under such circumstances it is claimed that a person owning such a machine, although it be used on his own land, is bound to exercise extra vigilance for the purpose of preventing injury to children who come upon the defendant's land allured by the machine and ignorant of its dangers. We do not think the facts of this case bring it within any such principle. The leading case in this country, and one which undoubtedly sustains the plaintiff's contention that it is a case for the jury, is that of *R. R. Co. v. Stout* (17 Wall. 657). That case has been followed in many states. In Missouri (*Koons v. R. R. Co.*, 65 Mo. 592); in Kansas (*Ry. Co. v. Fitzsimmons*, 22 Kans. 686; *S. C.*, 31 Am. Rep. 203, reporter's note at p. 206); in California (*Barrett v. So. Pacific Co.*, 91 Cal. 296); and in some other states. The contrary principle has been announced and held in *Daniels v. R. R. Co.* (154 Mass. 349), and *Frost v. Eastern R. R. Co.* (64 N. H. 220).

We think the better rule is laid down in the two cases last

cited. We do not assert that the defendant owed no duty to the plaintiff under the circumstances existing, but we think it did not owe the duty of such active vigilance as would be necessary to exist in order to send the case to the jury and permit it to find the defendant guilty of negligence in this case. The court, in *McAlpin v. Powell* (70 N. Y. 126), while distinguishing it from the *Stout* case (*supra*), expresses doubt of the correctness of the application of the principle in the latter case.

We have not had occasion to decide the question up to this time, but now that it is presented, we not only reiterate the doubt which we expressed in the *McAlpin* case (*supra*), but we think that the question of the defendant's negligence was erroneously submitted to the jury in the *Stout* case, and that we ought not to follow it as a precedent. We think it is not a question of fact to be submitted to the jury for its determination whether the defendant has or has not been guilty of negligence under such circumstances as appear in this case. Upon such facts we hold the defendant has violated no duty it owed the plaintiff. It is not contended for a moment that a person on his own land may under all circumstances do anything that he chooses without being held liable to answer in damages for injuries which are direct and probable and natural results of his action. We only say this is no such case. The case of *Bird v. Holbrook* (4 Bing. 628; 15 Eng. Com. Law, 91) is cited as analogous in principle to that which plaintiff urges in this case. We do not think so. The defendant in that case for the protection of his property, some of which had theretofore been stolen, set a spring gun, without notice, in his walled garden at a distance from his house. The plaintiff, who climbed over the wall in pursuit of a stray fowl, having been injured, it was held that the defendant was liable to him in damages. In that case the plea was made that the defendant had the right to protect his own property, and that one who was injured without having been invited upon the land, and who was unlawfully there, could maintain no action. It was held that the action was

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maintainable, for otherwise it might result in a mere trespass being made a capital offense. Chief Justice BEST said that the practice (without giving notice) was inhuman and the proof showed that the defendant had placed the spring gun on the wall for the express purpose of doing injury and that he had refused to give notice of its existence on the ground that if he gave notice he would fail to catch any one. The chief justice said that the defendant intended that the gun should be discharged and that the contents should be lodged in the body of his victim, and that he who sets spring guns without giving notice is guilty of an inhuman act, and if injurious consequences ensue he is liable to yield redress to the sufferer. The difference in the two cases is so plain as to require no discussion.

Cases are also cited where the defendant, for the purpose and with the intention of enticing his neighbor's dogs upon his premises, set traps very near the line of the highway, and then baited them with decaying meat, so that the scent was cast not only in the highway but upon the private premises of the plaintiff, whose dogs taking the scent came upon the defendant's grounds and were taken in a trap and thereby killed. One of such is the case of *Townsend v. Wathen* (9 East, 277). The court held the defendant liable upon the ground that one who sets traps to catch his neighbor's dogs, although the traps were set on his own ground, was liable for his wrongful intent and act and it was fit to be left to the jury whether it was not defendant's intention to catch the plaintiff's dogs, and it was held that a man must not set traps of a dangerous description in a situation to invite, and for the particular purpose of inviting, his neighbor's dogs, as it would compel them, by their instinct, to come into the trap. The act of the defendant in that case was not done in the prosecution of his immediate and proper business, but, as the court held, was a mere malicious attempt, successful in its result, to entice his neighbor's animals upon his property, and the enticement was effected by the means spoken of.

Quite a discussion upon the subject of the acts of an owner

upon his own land, directed to the preservation of game or to the destruction of dogs, etc., is to be found in the case of *Deane v. Clayton* (2 Eng. Com. Law. 183). In that case the court was equally divided, and so no judgment was rendered. The distinction is clear between acts of the nature spoken of in this case and those which are performed by an individual in the legitimate and honest conduct of his own business upon his own land. As is said by Mr. Justice COWEN in *Loomis v. Terry* (17 Wend. 497): "The business of life must go forward and the fruits of industry must be protected. A man's gravel pit is fallen into by trespassing cattle; his corn eaten or his sap drunk, whereby the cattle are killed; his unruly bull gores the intruder, or his trusty watch dog, properly and honestly kept for protection, worries the unseasonable trespasser. Such consequences cannot be absolutely avoided." The case of *Clark v. Chambers* (L. R., 3 Q. B. D. 327) is also cited as in some degree applicable. In that case the defendant erected a barrier along a way which it was admitted he had no legal right to erect. It was erected for the purpose of keeping people from traveling where they had a right to travel. The barrier which he erected was armed with spikes, and was a dangerous obstacle. Some person, without the defendant's authority, removed a part of the barrier from where the defendant had placed it and put it into an upright position across a footpath. The plaintiff, on a dark night, was lawfully passing along the road on his way from one of the houses to which the footpath led, when he came in contact with the spikes in the barrier and injured one of his eyes. The jury found that the barrier was in the road and dangerous to the safety of a person using it. It was held that the defendant, having unlawfully placed a dangerous instrument in the road, was liable in respect of injuries occasioned by it to the plaintiff, who was lawfully using the road, notwithstanding the fact that the immediate cause of the injury was the intervening act of a third party in removing the dangerous instrument to the footpath from the carriageway where defendant had placed it. In that case you start out with the admission that the act of the defendant

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was unlawful, and all that follows thereafter was held by the court to be the natural and probable result of his unlawful act.

In *Lynch v. Nurdin* (1 Adol. & El. [N. R.] 29; S. C., 41 Eng. Com. Law, 422) the plaintiff was a child seven years of age and the cartman of the defendant went into a house in London and left his horse and cart standing at the door without any person to take care of them, for about half an hour. The plaintiff got into the cart during the cartman's absence, and another boy led the horse on, and as plaintiff was about getting off the shaft the horse started and plaintiff fell and was run over by the wheel, and his leg broken. The trial justice left it to the jury to say, *first*, whether it was negligence in the defendant's servant to leave the horse and cart for half an hour, and, *secondly*, whether that negligence occasioned the accident. There was a verdict for the plaintiff. On the return of an order to show cause why a new trial should not be had, Lord DENMAN, Chief Justice, held that the case was properly submitted to the jury and the defendant was properly held negligent by the jury, and although the child had no business on the cart, and if an adult it would be said that his own negligence contributed to the injury, yet the child merely indulged his natural instinct in amusing himself with the empty cart and the deserted horse, and, therefore, it could not be said that he was negligent or that his action contributed to the injury within the legal sense of that term, and, therefore, the defendant could not be permitted to avail himself of that fact. In the course of his opinion the chief justice said there was a clear distinction to be taken between the willful act done by the defendant in the spring gun case, deliberately planting a dangerous weapon in his ground with the design of deterring trespassers, and the mere negligence of the defendant's servant in leaving his cart in the open street. In the latter case the liability of defendant is simply for negligence. There is a great difference in the facts between the case of *Lynch v. Nurdin* and the present case. Leaving a horse and cart in a public street unattended and loose, subject to natural observation and interference from

children passing along the street, might be held a proper question for the jury to say whether it was or was not negligence, while in the case of a defendant engaged upon his own land in simply doing that which it is necessary to do in order that he may carry on his business properly and who fails to exercise the highest vigilance in order to protect from possible harm children who may stray upon his land for no other purpose than recreation, we think there is an absence of any fact upon which a jury ought to be permitted to find negligence. The defendant in the one case was not upon his own land nor was he engaged in the proper transaction of his business thereon, but, on the contrary, he was in a public street and improperly left his horse and cart therein unattended and where others, and among them children, had the same right to be that he had. In the case of this defendant, on the other hand, the turntable was on its own land, it was a proper and appropriate machine for the carrying on of its business, it was properly made and it was properly used by the defendant. To liken such a case to the allurements of dogs by the spreading of tainted meat over traps on defendant's lands, done for the very purpose of injury, is as it seems to me to lose sight of the different principles upon which the cases rest.

At any rate we think that the plaintiff failed to show any actionable negligence on the part of the defendant, and a submission to the jury of the question of such negligence was error. All that can be said on either side of the question has been set forth in the *Stout* case and the various other cases cited above, and a continuation of the discussion would be fruitless.

We think the judgment for plaintiff must be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

ANNIE GOLDSMITH et al., Respondents, v. LEOPOLD GOLDSMITH,
Appellant.

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169	1562
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When a person, through the influence of a confidential relation, acquires title to property, the court, to prevent an abuse of confidence, may impress upon the property an implied trust and so grant relief.

G., the mother of the parties to this action, was the owner of a house and lot in the city of B., which was incumbered by a mortgage. The children lived with their mother, and the premises furnished a home for the family. In February, 1887, G., having become incapacitated for further care and management of the property, deeded the same to defendant without consideration, in pursuance of a parol agreement and promise on his part that he would hold the same for the benefit of the plaintiffs in common with himself, and would give them their shares in it. The plaintiffs were at that time minors. It was agreed that defendant should have all the accruing rents and his board in the family without charge, he to pay the interest on the mortgage and the taxes on the property. G. died in March thereafter. The agreement was carried out during her life and for some time thereafter. Defendant then sold the property, and with a portion of the avails purchased another house and lot; he was asked to take the deed in the name of all the children, but objected, promising, however, to execute a separate paper acknowledging and securing plaintiffs' rights in the property. Thereafter he repudiated the agreement and claimed to be the sole and absolute owner. In an action to compel performance of the agreement, *held*, that the arrangement was founded upon the relation of mother and son and brothers and sisters, and involved the trust and confidence growing out of these relations; that the denial by defendant of the rights of plaintiffs was a fraud upon them and upon the purpose of the deceased mother; that, conceding no express trust was created, a trust might be implied and properly enforced to prevent and redress the fraud, which trust is unaffected by the Statute of Frauds.

Also, *held*, that although an intended fraud was not explicitly and by the use of that word charged in the complaint, yet, as all the facts showing it were therein fully and clearly stated, the omission was not, after judgment, material.

Reported below, 6 Misc. Rep. 12.

(Submitted February 25, 1895; decided March 12, 1895.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made December

29, 1893, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

This action was brought by plaintiffs, who were four of the children of Barbara Goldsmith, deceased, against defendant, their brother, and the only other child of the deceased. Their complaint set forth the transfer by said Barbara Goldsmith to defendant of certain real property described, without consideration, to be held by him in trust for the benefit of all the children, the sale of said premises by defendant, and subsequent purchase by him with the avails of other real estate. The relief asked was that defendant be directed to transfer to each of the plaintiffs an undivided one-fifth interest in said last-mentioned real estate, and that he be directed to account for and pay to plaintiffs their share of the proceeds of the sale of said first-mentioned real estate, and for such other and further relief as might be just.

The facts, so far as material, are stated in the opinion.

Hays & Greenbaum for appellant. The parol testimony was incompetent to fasten a trust upon the defendant. (*Wheeler v. Reynolds*, 66 N. Y. 227; *Cook v. Barr*, 44 id. 156; *Sturtevant v. Sturtevant*, 20 id. 39; *Rathbun v. Rathbun*, 6 Barb. 98; *Levy v. Brush*, 45 N. Y. 589.) The only cases where parol evidence is admissible to establish a trust are those of fraud or mistake. (*Girard on Titles*, 257; *Hubbard v. Sharp*, 11 N. Y. S. R. 802; *Wheeler v. Reynolds*, 66 N. Y. 227; *Bailey v. Ryder*, 10 id. 363; *Sturtevant v. Sturtevant*, 20 id. 39; *Butler v. Viele*, 44 Barb. 166; *Fisher v. Fredenhall*, 21 id. 82; *C. C. Bank v. White*, 6 N. Y. 236.) The plaintiffs have not alleged or established any trust known to the law. (N. Y. R. S. [8th ed.] 2437, § 55.) The trust is void for want of certainty. (*Harrison v. McMennomy*, 2 Edw. 251; *Cook v. Barr*, 44 N. Y. 156; *Rathbun v. Rathbun*, 6 Barb. 98; *Gerard on Titles to Real Estate*, 257.) The trust, as found by the learned trial judge, is not valid as a trust to receive the rents and profits of land. (1 R. S. 728, § 55, sub. 3; *Cook v. Platt*, 98 N. Y. 35.) Parol evidence

will not be admitted to vary the consideration expressed in the deed. (*Graves v. Graves*, 29 N. H. 129; *Philbrook v. Delano*, 29 Maine, 410.) There has been no part performance shown sufficient to take the cause out of the statute. (*Rathbun v. Rathbun*, 6 Barb. 98; *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Wheeler v. Reynolds*, 66 id. 227.)

Jerry A. Wernberg for respondents. The plaintiffs in this action are not prevented from recovering by reason of the Statute of Frauds, for by the terms of the agreement by which the conveyance was made to defendant, the plaintiffs were to permit the defendant to live in the house without the payment of board; this the plaintiffs did do until the property was sold by defendant, and in addition thereto expended part of their earnings in keeping the property in repair. The defendant collected the rents of the house and paid the interest, taxes and some of the repairs on the property; thus it was a partly executed contract and the plaintiffs are entitled by law, if they have proved these facts to the satisfaction of the court, to have judgment compelling the defendant to complete the part of the contract he has left undone by giving to each of the plaintiffs the share he or she would be entitled to by the terms of the contract. (*Freeman v. Freeman*, 43 N. Y. 37; *Ryan v. Dox*, 34 id. 311; *Chapman v. Potter*, 69 id. 279.) A trust of personalty is not within the Statutes of Uses and Trusts, and may be created without writing, for any purpose not forbidden by law. (*Gilman v. McArdle*, 99 N. Y. 451; 12 Abb. [N. C.] 414; *Stettheimer v. Stettheimer*, 2 N. Y. S. R. 358; *Barry v. Lambert*, 98 N. Y. 300.) Any declaration, of a person in possession of property, acknowledging a trust, will be received as constituting the trust acknowledged. (*Day v. Roth*, 18 N. Y. 453; *Neilly v. Neilly*, 23 Hun, 653; 2 Story's Eq. Juris. § 972; *Day v. Roth*, 18 N. Y. 448; 1 Wend. 625; *Tracy v. Tracy*, 3 Bradf. 57; *Witzel v. Chapin*, Id. 386.) A court of equity will not permit the Statute of Frauds to be used as an instrument of fraud. (*Wood v. Rabe*, 96 N. Y. 414.) The statute against

the creation of a trust, unless by writing, cannot be invoked to protect the defendant, for that would result in his assistance in the perpetration of a fraud on plaintiffs. (*Bitter v. Jones*, 28 Hun, 492; 2 R. S. chap. 7, tit. 1, § 10.)

FINCH, J. The findings in this case show a situation which permits the application of an equitable remedy. They establish that Mrs. Goldsmith, while the owner and in possession of a house and lot known as the Myrtle avenue property, met with an accident which incapacitated her for its further care and management, and induced her to commit it to her son, the defendant; Leopold. That son was of age but unmarried and lived with the family, which further consisted of four children, three daughters and one son, all of them, with perhaps a single exception, minors, and two of them under ten years of age. The Myrtle avenue property furnished a home for the family which was supported partly by the rental of a portion of the house, partly by the husband and father, and to some extent by the labor of Annie, the eldest daughter, upon whom the household management devolved after the disability of the mother. The means of the family were narrow and limited. The home which they occupied was very essential to their comfort and support, but even that was incumbered by a mortgage, the annual interest of which was a charge upon their resources. In this state of affairs the findings show that the mother conveyed the house and lot to her son, Leopold, upon a promise on his part to hold it for the benefit of the other four children in common with himself, and give to them their shares in it. He paid no consideration for it beyond the promise thus made. It was a further part of the arrangement that he should have all the accruing rents, but should pay the interest on the mortgage and the taxes on the property, and was to have his board in the family without charge. In pursuance of this arrangement the deed was executed and delivered, and Annie herself took it to the clerk's office for record. It is quite evident that this was an arrangement founded upon the relation of mother and son, and brothers

and sisters, involving the trust and confidence 'growing out of that relation, and intended as a settlement of the family affairs. It furnished a home for all in which they were to have a common right, and which was to be for their joint benefit. The deed was made in February, 1887. The mother died in March of the next year. The plan originally adopted was carried out during her life and for some considerable time after her death. The daughters furnished Leopold his board without compensation or charge, as was arranged, and occasionally paid out small sums for ordinary repairs of the house. A time came when Leopold sold the Myrtle avenue property, and with a portion of the proceeds bought a house and lot on De Kalb avenue. There is evidence that on this occasion he was asked to take the deed in the name of all the children interested, but objected on the ground that it would be troublesome and inconvenient, and promised to execute a separate paper acknowledging and securing their rights in the property. Soon after he totally repudiated the agreement, and claimed to be the sole and absolute owner of the property, and now defends against the children, insisting that the agreement, if made, was void for uncertainty, and because it rested solely in parol.

There was enough of evidence to warrant the finding that Leopold at the time of the conveyance promised his mother that he would hold the property in trust for the plaintiffs herein. What he said on that occasion was expressed in somewhat different terms by different witnesses, but the substance of all of it concurred in the promise that he would hold the legal title for the benefit of the plaintiffs. That agreement was reflected in the action of both parties for some years after it was made, and induced the plaintiffs to do what otherwise they would not have done, and furnish Leopold his board without charge. The conduct of the latter in now denying the rights of the plaintiffs operates as a manifest fraud upon them and upon the purpose of the dead mother in seeking to provide for her children. It would be a reproach to equity if it proved unable to redress such a wrong.

It may be granted that no express trust was created, and that the judgment cannot be sustained on that ground, but we think the case is one in which equity will raise out of the situation, from the grouped and aggregated facts, an implied trust to prevent and redress a fraud, and which trust will be unaffected by the Statute of Frauds and may properly be enforced. The general rule was declared, in *Wood v. Rabe*, (96 N. Y. 425, 426), to be, that when a person, through the influence of a confidential relation, acquires title to property or obtains an advantage which he cannot conscientiously retain, the court, to prevent the abuse of confidence, will grant relief. It was added that, while the fraud must be something more than the mere breach of a verbal agreement, yet, where the transaction is one between parent and child, and involves the greatest confidence on one side and the greatest influence on the other, the case is one in which equity may properly intervene. One of the findings in this case is "that at the time said deed was delivered the defendant understood that his mother reposed confidence in him, and with that understanding accepted the conveyance and the confidence of his mother." There is no room to doubt the truth of that finding. There was not only involved the relation of mother and son, but that of brothers and sisters, for whose benefit the agreement was made. The absence of a formal writing grew out of that very confidence and trust, and was occasioned by it, as was also the subsequent performance by the children of the condition to furnish board without pay. Upon the whole transaction, therefore, including the confidential relation of the parties and its nature as a family arrangement very much beyond a mere business relation, we think it was competent for a court of equity to impress upon the property and its proceeds an implied trust for the benefit of the children. It is true that an intended fraud is not explicitly and by the use of that word charged in the complaint, but all the facts are there, fully and clearly stated, showing the fraud attempted to be perpetrated, and all that is omitted is the word or expression characterizing the necessary inference. We have held that

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such an omission after judgment is not material where the facts themselves have been sufficiently pleaded. (*Whittlesey v. Delaney*, 73 N. Y. 575.)

We think, therefore, that there was no error in awarding the relief, and that the judgment and order appealed from should be affirmed, with costs.

All concur.

Judgment affirmed. _____

GERTRUDE DEAN, an Infant, etc., Respondent, v. MINERS
RAPLEE, Appellant.

In an action to recover damages for an assault which, as set forth in the complaint, was committed in such manner and under such circumstances as to constitute the crime of rape, these facts appeared: In April, 1885, defendant took the plaintiff, who was an orphan fourteen years of age, to his home under an arrangement with her and her relatives, with whom she was then living, that he would board, clothe and educate her; she to become a member of his family, to perform such duties and receive such care and attention as a girl of her age would be entitled to receive from parents in the same condition of life. About a year thereafter, as plaintiff testified, defendant committed an assault upon her in a barn, where they were alone together, and had connection with her without her consent; that she begged him to let her go, asked him to desist, and resisted him to the best of her ability; that after the outrage he told her to stop crying, go to the house and keep still about it, and if she told any one it would be the worse for her; that on several subsequent occasions within a year thereafter he committed substantially similar assaults, he at each time commanding her never to tell and threatening her if she did, but did not threaten to do her any bodily harm. She made no outcry on any occasion, and it appeared that an outcry, if made, would have been heard by some one. Plaintiff was a slight, nervous girl; defendant a strong, powerful man; and the evidence justified a finding that he exercised a great influence and control over her will. In consequence of the assaults she became ill, having nervous spasms, etc. The action was commenced about three years after the last assault, and not until about the time of its commencement did plaintiff disclose the facts alleged. *Held* (PECKHAM and BARTLETT, JJ., dissenting), that while, in order to maintain the action, it was necessary to satisfy the jury that if defendant had the criminal connection with plaintiff it was accompanied with intent on his part to effect that purpose in defiance of all resistance and without her consent and against her will, and that she resisted to the best of her ability, under

all the circumstances, the evidence was sufficient to authorize the submission of these questions to the jury; and so, that with its determination this court could not interfere.

Reported below, 75 Hun, 389.

(Argued March 1, 1895; decided March 12, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 18, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Elmer E. Charles for appellant. On a review cases will be considered on the theory on which they were tried. (*Dauscha v. Brower*, 72 Hun, 221-224; *Salisbury v. Howe*, 87 N. Y. 128; *Storrs v. Flint*, 14 J. & S. 498-519; *Baird v. Mayor*, 96 N. Y. 603; *Stapenhorst v. Wolff*, 65 id. 597; *Wright v. Delafield*, 25 id. 266.) The motion for a non-suit made by the defendant should have been granted. (*Young v. Johnson*, 46 Hun, 164; 123 N. Y. 226; *Crossman v. Bradley*, 53 Barb. 125; *People v. Morrison*, 1 Park. Cr. Rep. 625, 643; *People v. Loftus*, 34 N. Y. S. R. 525, 527; *People v. Hulse*, 3 Hill, 309, 316, 317; *People v. Quinn*, 50 Barb. 132; *Reynolds v. People*, 41 How. Pr. 179, 187; *People v. O'Sullivan*, 104 N. Y. 481-485.) The plaintiff did not resist to the extent of her ability, but on the contrary "protesting she would ne'er consent, consented." She made no outcry at the time. She made no complaint of the alleged outrages until after she returned from Connecticut, more than three years after the alleged assaults. (*People v. Dohring*, 59 N. Y. 385; *People v. Hulse*, 3 Hill, 316.) The evidence fails to show that there was any force used by the defendant to accomplish his purpose, and shows that none was attempted or intended. (*People v. Kirwin*, 51 N. Y. S. R. 299.) The verdict was against the evidence. (*Kummer v. C. & T. S. R. R. Co.*, 50 N. Y. S. R. 332; *Dwight v. G. Ins. Co.*, 103 N. Y. 341.)

N. Y. Rep.] Opinion of the Court, per O'BRIEN, J.

Eugene W. Bartlett for respondent. The question involved was solely one of fact for the determination of the jury. (*People ex rel. v. Special Sessions*, 18 Hun, 331; *Nichols' Case*, Russell & Ry. 130; Roscoe on Crim. Ev. [5th Am. ed.] 287; *Day's Case*, 38 E. C. L. [9 C. & P. 722] 419; *Regina v. Case*, 1 Eng. Law & Eq. 544; *People v. Clemens*, 37 Hun, 580; *Reg. v. Hallett*, 9 Car. & Payne, 748; *Don Moran v. People*, 25 Mich. 356; 12 Am. Rep. 283; *Whitaker v. State*, 50 Wis. 518; 36 Am. Rep. 856; *Anderson v. State*, 104 Ind. 467; *Sidley v. State*, 4 id. 580; *Pomeroy v. State*, 94 id. 95; *Com. v. McDonald*, 110 Mass. 405; 2 Bish. Cr. Law, § 1122; *Huber v. State*, 126 Ind. 185; *Queen v. Flattery*, L. R. [22 Q. B. Div.] 410; *Hayes v. People*, 1 Hill, 352; *People v. Bransby*, 32 N. Y. 525; *People v. Bowles*, 3 N. Y. Cr. R. 447; *Higgins v. People*, 58 N. Y. 379; *People v. Connor*, 126 id. 278.) None of the objections to the admission or rejection of evidence, the charge or refusals to charge, were well taken. (*Greenleaf v. People*, 75 N. Y. 90.)

O'BRIEN, J. This action was brought to recover damages for an assault by the defendant upon the plaintiff, committed in such manner and under such circumstances as to constitute the offense of rape. It was alleged that in the month of March, 1886, and at different times during the following year, the defendant assaulted the plaintiff, and by force and threats of personal violence compelled the plaintiff to have sexual intercourse with him, without her consent and against her will. It appeared that in the month of April, 1885, when the plaintiff was but fourteen years of age, the defendant, who then had no children, took the plaintiff, who was an orphan, without father or mother, to his house, under an arrangement with her and some of her relatives that he would board, clothe and educate her; that she should become a member of his family, performing such duties and receiving such care and attention as a girl of her age would be entitled to receive from parents in the same condition in life. The arrangement, as testified to, would justify expectations and hopes on the part of the plaintiff of becom-

ing the heir of defendant's property, and it appears that he was a man of considerable means.

The relations which the parties occupied to each other were not those of master and servant, but rather that of parent and child. The plaintiff was subject to such authority on the part of the defendant, and was accustomed to render such obedience to his commands as is common and usual where that relation exists. The first assault, it is claimed, was committed about a year after the parties entered into these relations. The fact itself, and all the attending circumstances, depend mainly, if not entirely, upon the testimony of the plaintiff. Her evidence is that she was sent to the horse barn to look for eggs, and shortly after she got there and commenced the search for eggs the defendant appeared in the barn and told her to go up into the loft and look there, which order she obeyed. After being there about five minutes and not finding any eggs, she started to go down, but seeing the defendant coming up the stairs she stepped back, waiting for him to come up until he reached the landing. He then inquired if she had found any eggs, and she replied that she had not. He then said that she had better put on her spectacles, and, stepping up to her put his arm around her, his hand under her chin, and, after kissing her several times, commenced to push her back upon the hay. She asked what he was going to do and told him to stop, and he told her to keep still, that he would not hurt her, and then pushed her back upon the hay and had connection with her, she all the time begging him to let her go, asking him to desist, and trying to push him away, and, as she says, in general terms, resisting him to the best of her ability. After the outrage she says that he lifted her up, told her to stop crying, go to the house and keep still about it, and that if she told it to any one it would be the worse for her. She states that on six or seven subsequent occasions, during the year following, assaults of substantially the same character, and under similar circumstances, were repeated. On two of these occasions, after having seized and thrown her down, he desisted from his purpose at one time, as she says, through fear of exposure

by some one approaching, and at another on account of her condition, having been suddenly seized at the time of the assault with what is described as some spasmodic nervous affliction as the result. The evidence tended to show that the plaintiff was a slight nervous girl, and that after the fourth or fifth occasion, about July or August of the year, she became ill from the effects of the previous assaults. That this illness manifested itself in nervous spasms and in other ways which experts attempted to trace to the treatment she had previously suffered at the hands of the defendant. The description here given of the circumstances of the first assault will apply for all practical purposes to the others. She made no outcry on any occasion, though she swears that the offense was committed against her will and against all the resistance she could make and without her consent. The place where these assaults were made was, as she testified, when the parties were alone in the barn where the plaintiff had been sent or had been called on some errand, but on one occasion it took place at a considerable distance from the house in an open field. The fair conclusion from all the evidence is, however, that an outcry if made by the plaintiff would have been heard by some one. This action was commenced some three years after the last assault, and not till about the time of the bringing of the suit did the plaintiff disclose the facts here related. The defendant was a strong, powerful man, and all the circumstances justified the jury in believing that he exercised great influence and control over her will, and it appeared that at the time of each assault he commanded her never to tell what had taken place, threatening her if she did, though none of the threats were of a character to warrant the belief that any bodily harm was intended.

A motion for a non-suit and for a dismissal of the complaint was denied and the case was submitted to the jury and a verdict found for the plaintiff. The General Term has affirmed the judgment.

The learned trial judge charged the jury that the plaintiff in order to maintain the action must satisfy them, from all the

proofs, that if the defendant had criminal connection with her, that it was accomplished with the intent on his part to effect his purpose in defiance of all resistance, and that it took place without her consent, against her will and that she resisted to the best of her ability, under all the circumstances.

There are cases that seem to hold that a civil action of this kind based upon a charge such as is set forth in the complaint in this action may be maintained upon evidence such as might not be sufficient to warrant a conviction upon a criminal charge of rape. Some of these cases are referred to in the opinion of the learned judge in the court below, but it is unnecessary to comment upon them since we are of the opinion that the judgment in this case must be upheld, if at all, upon the view of the law given by the trial judge to the jury. Moreover, we think that this is the correct rule. The principle was necessarily involved in the case of *Young v. Johnson* (46 Hun, 164), which was affirmed in this court (123 N. Y. 226). The point was not discussed in the opinion when that case was here, but the decision covered the question.

Assuming this to be a correct statement of the law applicable to cases of this character, the question now arises whether there was in this case any evidence to submit to the jury. It is not often that such an assault is or can be described by a female with that complete fullness of detail with respect to every word spoken or every fact and circumstance that may enter into the questions of consent or resistance. When the proof is given, as it sometimes is in general terms, the jury must still be satisfied that there was no consent, and that resistance was made to the extent of the woman's ability. What that ability was must in many cases depend not only upon her strength and power to defend herself or make herself heard, but also upon the element of fear when it exists. The age, strength and physical appearance of the parties, with the manner in which they testify, are elements of some importance which the jury may consider with all the other facts. The relation which the parties bear to each other, as in this case, may also be considered. Where on one side we

find extreme youth, inexperience and dependence united with the principle of fear and obedience, and on the other, mature age, great physical power and dominating influence and control over the movements and will of another, the question of consent and resistance must be determined with reference to these conditions.

When such a case arises who is to determine when, as in this case, the girl, in stating the occurrence, states that she did not consent and did resist to the best of her ability, whether she tells the truth or not? Can this court, after the jury have accepted the plaintiff's version of the transaction and the General Term has approved the verdict, say, as matter of law, that there was no evidence for the consideration of the jury? This, I think, would be to transcend the limits of our jurisdiction as a court of law, without power to review disputed facts. Whatever we might think of this case, if we had the power to determine the facts, I think we cannot say, as matter of law, that it was impossible for the jury to take the view of the case that they did.

This court said, in the case of *People v. Conner* (126 N. Y. 278): "When an assault is committed by the sudden and unexpected exercise of overpowering force, upon a timid and inexperienced girl, under circumstances indicating power and will of the aggressor to effect his object, and an intention to use any means necessary to accomplish it, it would seem to present a case for the jury to say whether the fear naturally inspired by such circumstances had not taken away or impaired the ability of the assaulted party to make effectual resistance to the assault."

If we should attempt to determine the facts in the case ourselves, it seems to me that we would be obliged to admit, as a first step, that there was some evidence on the part of the plaintiff for our consideration, though we might not be inclined to believe it. But the plaintiff's credibility was for the jury. If she told the truth there was evidence upon which to base the verdict.

We would have very much less hesitation in affirming this

judgment but for the fact that there appears in the record two letters written by the plaintiff about a month after the date of the first assault to a female friend, who produced them at the trial. It is impossible to read these gossiping letters, written from the defendant's house, without being impressed with the fact that this girl had then been corrupted, whether by the defendant or by some other evil influence, it is impossible to say. The defendant's plan of defense necessarily precluded him from giving any light on that point. On the stand he denied the charge in general and in every particular, and hence he had to satisfy the jury that the plaintiff's story in regard to these several outrages upon her person, in which time, place and circumstances were given, were, after all, nothing but pure invention, and that her testimony from beginning to end did not contain even a single element of truth. If it was our duty to try the facts and declare where the truth lay, instead of reviewing the questions of law, we might hesitate before accepting either version of the case. On the plaintiff's evidence she never made on her part the slightest advances that would indicate consent. The case, as it stands, resolves itself into a question of resistance on her part to the best of her ability, and that, we think, was, under the peculiar circumstances of the case, for the jury.

Since the amendment of the Penal Code (§ 278) by ch. 693 of the Laws of 1887, the acts charged against the defendant, when committed upon a female under sixteen years of age, would amount to rape; and while the present case must stand upon the law as it existed when the alleged assaults were made, yet the reasons which induced the legislature to change the law cannot be ignored in our review of the case. That act eliminated the question of consent or resistance from the case of an assault upon a female under that age on the trial of a criminal charge. The amendment was evidently based upon the principle that consent or non-resistance on the part of a girl of that age was not to be understood in the same way as in the case of like acts committed upon a woman of more mature years. The jury could have taken the same view of

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this case. The circumstances of the various assaults extending over the period of a year, and the failure of the girl to make any disclosures for so long a time, tended to cast suspicion upon her testimony upon the point of consent and resistance. If this was a criminal case where the prosecution is bound to prove the charge beyond a reasonable doubt, the appeal would be entitled to prevail. But here a preponderance of proof is sufficient. (*People v. Briggs*, 114 N. Y. 56.) Whether there was such a preponderance depended to a great extent upon the credibility to be given to the plaintiff's testimony, and this was a question for the jury. It was also a question that the trial judge could have dealt with after the verdict or the General Term upon appeal. The case having passed these stages, this court has no power to set aside the verdict unless it can say either that there is no evidence at all or not more than a scintilla. We cannot do that without assuming functions that have not been conferred upon the court, and so, we think the judgment must be affirmed.

ANDREWS, Ch. J., FINCH and GRAY, JJ., concur; PECKHAM and BARTLETT, JJ., dissent on the ground that there was not sufficient evidence in regard to the girl's resistance to go to the jury; HAIGHT, J., not sitting.

Judgment affirmed.

In the Matter of the Claim for a Ring of MARY L. VAN SLOOTEN, Respondent, v. EDWARD DODGE, as Administrator, etc., Appellant.

Under the provisions of the Revised Statutes (2 R. S. 88, § 86), providing for the reference of disputed claims against the estate of a deceased person, a claim could only be the subject of an agreement with an executor for a reference which existed as such against the deceased, and was one for which his estate had become answerable, and the executor could not, by offering to refer a claim presented, waive these essential prerequisites of the statute.

An executor cannot subject the estate in his hands for administration to a new liability, either by his contracts or by his wrongful act.

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167	33
167	36
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A claim against the estate of D., deceased, was presented to the executors under said statutory provisions, for a diamond ring, which the claimant alleged the testator had given to her, and which, at the request of the executor, she had handed to him for inspection, but he refused to return it, claiming that it belonged to the estate. The claim was disputed by the executor, and, upon his offer to refer, a reference was consented to and ordered, and, upon evidence sustaining the claimant's averments, the referee reported in favor of the claimant, the report was confirmed and judgment entered. *Held*, error; that, as no claim against the deceased was established, no recovery could be had.

In re Van Slooten v. Wheeler (76 Hun, 55), reversed.

(Argued February 28, 1895; decided March 12, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 12, 1894, which affirmed a judgment in favor of claimant entered upon an order confirming the report of a referee.

The nature of this proceeding and the facts, so far as material are stated in the opinion.

H. B. Hubbard for appellant. There is no basis for the maintenance of this proceeding against the estate of the testator. (*Godding v. Porter*, 17 Abb. Pr. 374; *Smith v. Patton*, 9 Abb. [N. S.] 205; 2 R. S. chap. 6, tit. 3, art. 2, §§ 34-39; Code Civ. Pro. § 2718.) In any view of the facts, the referee erred in finding that the claimant was entitled to judgment against Charles H. Wheeler, as executor of the estate of Harry E. Dodge, and in refusing to find the conclusions of law proposed by the defendant. (*Ferrin v. Myrick*, 41 N. Y. 315; *Barry v. Lambert*, 98 id. 308; *Schmittlaer v. Simon*, 101 id. 554; *Stanton v. King*, 76 id. 585; *Cary v. Gregory*, 6 J. & S. 127.)

Merritt E. Haviland for respondent. There was a valid gift of the ring by the deceased to claimant *inter vivos*. (*Bedell v. Carll*, 33 N. Y. 581; *Curry v. Powers*, 70 id. 217; *Trow v. Shannon*, 78 id. 450; *Beaver v. Beaver*, 117 id. 428.) The evidence of claimant's six witnesses, which con-

clusively established the gift, stands uncontradicted and unimpeached in the slightest particular, and the referee very properly gave due weight to their evidence. (*Elwood v. W. U. T. Co.*, 45 N. Y. 553; *Lomer v. Meeker*, 25 id. 363.) The executor is liable in his representative capacity as well as individually, for the reason that the estate received the benefit of the ring as an asset. (*Wall v. Kellogg*, 16 N. Y. 385; *Story Eq. Juris.* § 796; *Simpson v. Snyder*, 54 Iowa, 558; *Steele v. McDowell*, 9 S. & M. 193; *Conger v. Atwood*, 28 Ohio St. 140; *Francisco v. Fitch*, 25 Barb. 122; *Peoples v. Hueston*, 32 Hun, 56.) The reference herein having been made on consent, it is too late for the estate to question the power of the referee to pass upon the controversy. (*Masten v. Buddington*, 18 Hun, 106; *Adams v. Brady*, 67 id. 522.)

GRAY, J. This respondent presented a claim against the executor of the estate of Harry E. Dodge, deceased, for a diamond ring of the value of not less than \$500, which, she alleged, the testator had given to her and which, after his death, at the request of the executor, she had handed to him for inspection. She alleged that he had refused to return it to her, upon the ground that it belonged to the estate of the deceased. The executor disputed the validity of the claim and, upon his offer to refer the same, a reference was consented to and ordered. The referee reported in favor of the claimant. His report was confirmed at the Special Term and a motion to set it aside and for a new trial was denied. Upon appeal, the General Term affirmed the judgment and the order; but by a divided court, Mr. Justice CULLEN dissenting from his associates upon the ground, substantially, that, as no claim against the deceased had been established, no recovery could be had in such a proceeding. I think his was quite the correct view of the case. I think that the findings of the referee, that the deceased in his lifetime had given the ring to the claimant and had delivered it to her with the intention that she should possess it, were in accord with the evidence in

the case. There is but little evidence from which a contrary inference could be made. That being the case and the claimant having shown that she had lost possession of the ring solely through the act of Mr. Wheeler, who was the executor, it is difficult to understand how such a proceeding as this could be maintained. The finding of the referee, with respect to the claimant's loss of possession of the ring, was as follows: "That shortly after the death of said Harry E. Dodge, the claimant delivered said diamond ring to said Charles H. Wheeler as executor, at his request, but not intending to, nor did she thereby release or transfer her right and title thereto, as owner." It seems that upon the occasion of a certain interview between the executor and the claimant, a short time after the testator's death, he asked for and obtained the ring from her; either, according to her account, upon the pretext that he wished to inspect it; or, according to his account, upon his request that she should give it to him for the purpose of having it inventoried. The conflict of evidence upon the manner in which Mr. Wheeler, the executor, had acquired the ring, is not very material and the referee has settled it by the finding above mentioned. The difficulty with the recovery in this case is, as Mr. Justice CULLEN has pointed out, that this is a special proceeding and is maintainable solely by virtue of the provisions of the statute; which, at the time of the agreement to refer, were contained in the Revised Statutes (2 R. S. 2561, 2562). Those provisions prescribe a publication by the executor or administrator of a notice, requiring all persons having claims against the deceased to exhibit the same, at a place and time specified, and authorize him, if he doubt the justice of any such claim, to enter into an agreement in writing with the claimant to refer the matter in controversy. It is obvious that a claim could only be the subject of an agreement for a reference with an executor, if it existed as such against the deceased, and was one for which his estate had become answerable and which, therefore, would devolve upon his executor or administrator by virtue of the representative nature of his

office. If this ring belonged to the claimant by gift from the testator in his lifetime, its subsequent taking by Wheeler, who was his executor, could not create a claim against the deceased. The claimant never had any claim against the deceased and when Wheeler took it, he did so as the individual and, as the individual, could be made responsible in a proper proceeding for the consequences of his act.

It was supposed at the General Term, by the learned justices who concurred in affirming the recovery, that authority for the maintenance of such a claim, as against the executor, could be found in the following two cases: *Wall v. Kellogg's Executors* (16 N. Y. 385), and *De Valengin's Administrators v. Duffy* (14 Peters, U. S. 282.) I cannot so read these cases. In *Wall v. Kellogg's Executors*, the testator, by his will, had given a power of sale to his executors and they, acting under the power of sale, sold certain lands; the title to which was, in fact, only held by the testator as a naked trustee for the plaintiff and another. The plaintiff was always equitably entitled to a conveyance of them, upon the payment of certain moneys. The executors by selling the lands to a third person, who bought in good faith and without notice, had deprived themselves of the power of performing specifically their testator's agreement to convey the lands to the plaintiff. The action was, therefore, held to be maintainable against the executors, and the estate having received the benefit of the purchase money paid for the lands, it was equitably chargeable with the sum which the plaintiff had been obliged to pay to protect his interest in them. In the case of *De Valengin's Administrators v. Duffy*, De Valengin was the bailee of certain goods shipped by Duffy, which were captured by the Brazilian government. De Valengin prosecuted a claim against that government for remuneration, but died before receiving any thing upon it. After his death the Brazilian government made compensation to De Valengin's administrators. Duffy sued the administrators, as such, for the moneys they had so received. The action was held maintainable, because De Valengin's administrators had received the moneys

as administrators; and the case was likened to that of a factor, who dies after the sale of his principal's property and before the receipt of the money. This principle was laid down in the opinion: "Whatever property or money is lawfully recovered or received by the executor or administrator, after the death of the testator or intestate, in virtue of his representative character, he holds as assets of the estate, and he is liable therefor, in such representative character, to the party who has a good title thereto." In each of those cases the liability of the executors, or of the administrators, as such, existed because of transactions to which the deceased had been a party and because his estate had become chargeable with a liability which he was under, or would have been under, if he had lived. An executor cannot subject the estate in his hands for administration to some new liability, either by his contract, or by his wrongful act. In the present case, whatever claim this claimant had, because of the taking of the ring from her possession by Mr. Wheeler, was against him individually and in no sense against him in his executorial capacity.

It was said, in the opinion of the majority at the General Term, that "no harm can be done by the executor delivering it back to the plaintiff," and the argument in support of the proceeding would seem to be that, as it is neither a claim on a contract, nor a claim for damages, but simply a claim for the restoration of the ring to the claimant, the case falls without the ordinary rule. I fail to see any force in the suggestion. The result has been to impose costs upon this estate, amounting to upwards of \$700; and to that extent to unlawfully diminish the assets of the estate. Upon what legal theory, or upon what authority, shall the estate be made to pay this large sum of costs, which has rolled up in defending the executor's act? I know of none. The executor could not, by offering to refer the claim, waive the essential prerequisite of the statute that the claim must have been one against the deceased, which had accrued in his life, or which would have accrued against him, had he lived.

The judgment appealed from should be reversed and an order entered dismissing the proceeding, with costs in all the courts to the appellant against the respondent.

All concur.

Judgment accordingly.

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j 150	71

THOMAS JONES, as Receiver, etc., Respondent, v. FERDINAND S. M. BLUN et al., Appellants.

Where a temporary receiver, appointed in an action to sequester the property of a corporation, has duly executed and filed the requisite bond, and thereafter, under the judgment in the action, is continued as permanent receiver, while a further bond may be exacted in the discretion of the court, he is under no obligation to furnish it until required to do so, and his failure to do so does not affect his power to act as permanent receiver.

Although a partnership may be regarded as a legal entity for certain purposes, this fiction may not be invoked to shield one of the co-partners who is a stockholder in a corporation, from the effect of a statute forbidding a preference to the stockholder, or to enable him to do as a partner that which the law prohibits him from doing as an individual.

In an action brought by a receiver of the R. & T. M. Co., a manufacturing corporation, to set aside certain transfers alleged to have been made by the corporation to the defendants, one of whom was a stockholder of said corporation, in violation of the statutory provisions (1 R. S. 603, § 4) prohibiting the transfer by a corporation after it has "refused the payment of its notes or other evidences of debt," of any of its property or choses in action to a stockholder, in payment of a debt, the defendants claimed that the judgment of sequestration and the appointment of plaintiff was without jurisdiction and void. These facts appeared: Plaintiff was appointed receiver in an action brought by a creditor against the corporation to sequester its property. That action was based upon a judgment recovered against the corporation in the City Court of Auburn, which was set forth in the complaint; the corporation did not do business and was not located in that city. *Held*, that the allegations in the complaint in the former action presented the question as to whether the City Court had jurisdiction, and if the court erred in its determination, it was a judicial error to be corrected on appeal therein, and the judgment of sequestration could not be attacked collaterally; and that this was a collateral attack.

Defendants were co-partners. Defendant B. was a stockholder in said corporation; after it had refused the payment of its evidences of debt, it transferred to defendants' firm, in payment of a debt due to the firm, an

indebtedness to it of another corporation. *Held*, that the transfer was within the prohibition of the statute, and so was void; and that plaintiff was entitled to recover the moneys collected by defendants' firm on the claim so transferred.

(Argued March 1, 1895; decided March 12, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 18, 1894, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

B. T. Wright for appellants. The plaintiff is not entitled to a judgment against the defendants. (*Menagh v. Whitwell*, 52 N. Y. 146; *Bulger v. Rosa*, 119 id. 450; *Coats v. Donnell*, 94 id. 168; *Bank of Buffalo v. Thompson*, 121 id. 280.) The defendants are not liable under the last clause of the section under which this action is brought, for the reason that there was never any transfer or assignment to them of property in contemplation of the insolvency of the company. (*Hayes v. Beardsley*, 136 N. Y. 299; *Paulding v. C. S. Co.*, 94 id. 334; *Dutcher v. I. & T. N. Bank*, 59 id. 5; *Parish v. Wheeler*, 22 id. 494; *Curtis v. Leavit*, 15 id. 9; *Rudd v. Robinson*, 126 id. 113.) The court should have permitted the defendants to show that the judgment of sequestration and appointment of the plaintiff as receiver of the Rheubottom & Teall Manufacturing Company is void; that the court obtained no jurisdiction of the subject-matter therein, or power to proceed therein, because there was no judgment upon which to found the same. (*Hubbard v. N. P. Ins. Co.*, 11 How. Pr. 149, 151; *Conroe v. N. P. Ins. Co.*, 10 id. 403, 405; *O. S. Factory v. Dolloway*, 21 N. Y. 449; *W. T. Co. v. Scheu*, 19 id. 408; *U. S. Co. v. City of Buffalo*, 82 id. 351; *Phillips v. B. L. Co.*, 21 Atl. Rep. 640, 641; *Carpenter v. W. A. B. Co.*, 32 Fed. Rep. 434, 435; *Reifsnider v. A. I. P. Co.*, 45 id. 433; *Barrett v. C. & L. H. R. R. Co.*, 4 Hun, 114;

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Decker v. Gardner, 124 N. Y. 334; Code Civ. Pro. §§ 1784, 1788, 2439; *Ferguson v. Crauford*, 70 N. Y. 253; *Colwell v. G. N. Bank*, 119 id. 408; *Morrow v. Freeman*, 61 id. 515, 518, 521; *Bullymore v. Cooper*, 64 id. 236; *Smith v. Reed*, 134 id. 568, 571; *Adams v. S. & W. R. R. Co.*, 10 id. 328; *Cole v. M. I. Co.*, 133 id. 164; *O'Brien v. McCann*, 58 id. 373; *Milbank v. Jones*, 141 id. 340.)

E. C. Aiken for respondent. The appellants attempted to attack the judgment of sequestration and order appointing the receiver collaterally, as without jurisdiction. This question has already been decided by this court adversely to the appellants. (*Hunting v. Blun*, 143 N. Y. 511; *Bangs v. Duckenfield*, 18 id. 592; *Fisher v. Hepburn*, 48 id. 53; *Whittlesey v. Frantz*, 74 id. 456; *A. Ins. Co. v. Barnard*, 96 id. 525; *Potter v. M. Bank*, 28 id. 641; *Moeschler v. Lochte*, 12 N. Y. S. R. 855; *Andrews v. Moller*, 37 Hun, 480.) The appellants contend that the plaintiff has not filed a bond as permanent receiver. We answer that the plaintiff qualified as temporary receiver and was empowered by the order appointing him such temporary receiver to maintain this action, and that it was not necessary to refile that bond or another. (Code Civ. Pro. § 1788; *Whiteside v. Pendergast*, 2 Barb. Ch. 471; *Morgan v. Potter*, 17 Hun, 403.) Plaintiff has a good cause of action and defendants are liable. (1 R. S. chap. 18, tit. 4, § 4; *Bank of Buffalo v. Thompson*, 121 N. Y. 280; *N. Bank v. Tarbox*, 38 Hun, 57; *Bradner v. Strong*, 89 N. Y. 299; *Palmer v. Scott*, 68 Ala. 380; *Sheldon v. Clifton*, 23 How. [U. S.] 172; *Throop v. H. Co.*, 125 N. Y. 530; *Knox v. Baldwin*, 80 id. 610.)

BARTLETT, J. This action is brought to set aside certain transfers made by the Rheubottom & Teall Manufacturing Company to the firm of F. S. M. Blun & Co., on the ground that defendant Blun was a stockholder of said corporation and that the transactions attacked were after the corporation had refused the payment of its notes or other evidences of

debt, and were, therefore, prohibited by statute. (1 R. S. 603, § 4; Banks & Bros. 8th edition, vol. 3, p. 1729.)

The plaintiff recovered at Special Term and the General Term affirmed the judgment.

A preliminary point is raised by the appellants to the effect that the judgment of the Supreme Court sequestrating the property of the Rheubottom & Teall Manufacturing Company and appointing the plaintiff receiver of its property is void.

This contention rests on the allegation that the Supreme Court suit is based upon a judgment recovered against the corporation in the City Court of Auburn, and that, as matter of fact, the latter court had no jurisdiction of the corporation, as it did not do business and was not located in the city of Auburn.

The defendant Ferdinand S. M. Blun was sued by Frank M. Hunting, as assignee of certain employees of this corporation, and in that action Blun sought to attack the validity of the judgment of the Supreme Court in the sequestration suit on the same ground as above stated.

This court held (*Hunting v. Blun*, 143 N. Y. 511) that the complaint in the sequestration action fairly alleged all that was needed to authorize the judgment of the court. Judge FINCH says:

"It avers the recovery of a judgment against the corporation in the Auburn City Court, the docket of that judgment in the Cayuga county clerk's office, the issue of an execution and the return of the same unsatisfied.

"Those allegations presented a case over which the jurisdiction of the court was unquestionable.

"They were sufficient to invoke and require a judicial determination whether they were true or not and whether sequestration should follow. It may be that the court erred in regarding the City Court judgment as valid.

"That was a question of law for the court to decide, and its error, if it made one, was a judicial error to be corrected by an appeal."

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Judge FINCH then goes on to point out that this court held in *Whittlesey v. Frantz* (74 N. Y. 457) that the judgment of sequestration could not be collaterally attacked for error in the proofs on which it rested.

In the case at bar the learned counsel for the defendants seeks to avoid the effect of our decision in the *Hunting* case by claiming that the attack here made upon the judgment of sequestration is not collateral and that the question of its validity is directly in issue.

We regard this view of the situation as unsound, this court having decided that the judgment of sequestration is valid until reversed on appeal.

When the receiver, appointed under this valid judgment, sues to recover the assets of the corporation and the defendants seek to assail the judgment it is a collateral attack and one the law will not tolerate.

A further objection is made to the receiver's power to sue on the ground that he was, before judgment, appointed temporary receiver and as such duly executed his bond, but failed to furnish a new bond when by the judgment of the court he was continued as permanent receiver.

It is undoubtedly true, as a general rule, that a receiver before interfering with the assets must furnish his bond. In the case at bar no such question is presented.

The judgment recites that Thomas Jones, heretofore appointed the receiver of the corporation, is hereby continued as the permanent receiver.

The court is thus dealing with its own officer in charge of assets and with his bond on file.

If a further bond were deemed proper the court had ample power to direct it to be given.

Section 1788 of the Code of Civil Procedure provides that where a temporary receiver is continued by final judgment he is a permanent receiver and has the powers and authority and is subject to the duties and liabilities imposed upon a receiver appointed in proceedings for the voluntary dissolution of a corporation.

The appointment of a receiver in proceedings for the voluntary dissolution of a corporation is provided for by section 2429 of the Code of Civil Procedure, and the matter of the receiver's bond is regulated by the Revised Statutes (2 R. S. 468, § 66).

That section provides that the receiver shall give such security to the people of this state as the court shall direct.

When the court continues in office its receiver already in possession of the assets, with his bond duly executed and on the files, it is fair to assume that the security is deemed satisfactory if a further bond is not required.

In the case before us, the temporary receiver was authorized to sue by order of the court, and the final judgment re-affirmed the order.

We, therefore, hold the receiver entitled to sue, and that, while a further bond may be exacted in the discretion of the court appointing him, he is under no obligations to furnish additional security until required to do so.

This brings us to the merits of the controversy. Among a large number of facts found by the Special Term, the following are material to the case as presented on this appeal:

The Rheubottom & Teall Manufacturing Company was incorporated under the act of 1848, and the defendant Ferdinand S. M. Blun was a stockholder.

The plaintiff was appointed by the Supreme Court, in sequestration proceedings, the receiver of this corporation.

The defendants were co-partners doing business in the city of New York under the firm name, "F. S. M. Blun & Co." Blun was entitled to seventy per cent of the profits of his firm.

The defendant Sigmund Bendit was not a stockholder in the corporation, nor was the firm as such.

The corporation refused the payment of its notes or other evidences of debt on or about October 10th, 1890, and continued so to do until judgment was entered against it.

A corporation known as the American Clasp & Steel Company was indebted to the Rheubottom & Teall Manufacturing Company for goods sold. The defendant Blun was the treasurer of the American Clasp & Steel Company.

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After the Rheubottom & Teall Manufacturing Company had refused the payment of its notes or other evidences of debt, it transferred to the defendants on several occasions money due to it from the American Clasp & Steel Company for the payment of its indebtedness to the defendants.

The receiver seeks to recover the money so received by the defendants on the ground that it is in violation of the statute. (1 R. S. 603, § 4; Banks' 8th ed. vol. 3, p. 1729.) The statute reads as follows:

"§ 4. Whenever any incorporated company shall have refused the payment of any of its notes, or other evidences of debt, in specie, or lawful money of the United States, it shall not be lawful for such company, or any of its officers, to assign or transfer any of the property or choses in action of such company, to any officer or stockholder of such company, directly or indirectly, for the payment of any debt; and it shall not be lawful to make any transfer or assignment in contemplation of insolvency of such company, to any person or persons whatever; and every such transfer and assignment to such officer, stockholder or other person, or in trust for them or their benefit, shall be utterly void."

The learned trial court refused to find that these transfers were made in contemplation of insolvency under the latter part of the section quoted, but held it to be a transfer by the company to a stockholder for the payment of a debt. The question of whether the transfer was made in contemplation of insolvency, which the appellants' counsel has argued with much earnestness, is wholly immaterial as the case is now presented.

The court below has decided that the Rheubottom & Teall Manufacturing Company, after it had refused the payment of certain of its notes or other evidences of debt, transferred to defendant Blun, one of its stockholders, money of the company for the payment of a debt. This transfer the statute declares to be void whether made directly or indirectly to the stockholder or other person in trust for him or for his benefit.

The appellants insist that the statute has no application for

the reason that the money was paid by the corporation through the American Clasp & Steel Company to the defendants to pay debts due to the defendants' firm and that the firm and defendant Bendit are not stockholders.

It is found, as already stated, that defendant Blun, who is a stockholder, is interested to the extent of seventy per cent in the profits of the firm.

This defense cannot be maintained, as the payment of the money to the firm was indirectly for the benefit of Blun and void under the statute.

The object of the statute is clear. It is intended to protect the general creditors and prevent officers and stockholders of corporations, who happen to be creditors of the company, securing to themselves a preference after the company has refused the payment of its notes or other evidences of debt.

There is no such potency in the entity known as a co-partnership as to shield a stockholder of a corporation from the penalty denounced by this statute because he happens to be a member of a firm and thus allow him to secure to himself a preference of his claim against a corporation.

If his co-partner, who is not a stockholder, is injured by the enforcement of the statute, it may be a matter for adjustment between themselves, but offers no reason for suspending the operation of the statute.

If the contrary doctrine were to prevail it would result in the officers and stockholders of corporations securing to themselves indefinite preferences by forming partnership relations in which the interest in the firm profits of the partner not a stockholder would be only nominal.

The statute is carefully drawn, so as to prevent all indirect as well as direct assignments or transfers of property of a corporation to its officers or stockholders.

This court held, (*Knox v. Baldwin*, 80 N. Y. 610) that where a manufacturing corporation is indebted to a firm, one member of which is a trustee of the corporation, neither the members of the firm jointly, nor the other members to whom the trustee has transferred his interest, can maintain an action

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against another trustee for failure to file the annual report, nor hold him as a stockholder until stock is paid up and certificate filed.

This was for the reason that the creditor trustee being equally with the other trustees charged with the duty of seeing to it that the annual report is made and the certificate of paid-up stock is filed, and so being chargeable with default, he cannot alone, or in connection with his associates, nor can his assignees, pursue a remedy which, if enforced, would enable him to profit by his own wrong or negligence.

So in the case at bar the defendant Blun cannot, being a stockholder of the Rheubottom & Teall Manufacturing Company, secure through his firm a preference in which he would enjoy a share of seventy per cent, which the statute would not permit to him individually.

It has been often pointed out that a partnership cannot properly be regarded as a legal entity separate and distinct from the several partners therein.

For certain purposes this fiction may be very properly indulged.

In keeping partnership accounts and in marshaling the assets of an insolvent or liquidating firm this is constantly done.

It cannot be invoked, however, to shield the individual partner, in a case like the one at bar, from the effect of a statute forbidding a preference, or to enable him to do as a partner that which the law prohibits him from doing as an individual.

The judgment appealed from should be affirmed, with costs.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

GEORGE LEWIS PRENTISS, as General Guardian, etc., Appellant, v. ELLEN BOWDEN, Respondent.

To sustain an action brought by a judgment creditor in his own behalf simply, to set aside a conveyance of land made by his debtor, on the ground that it was made in fraud of creditors, plaintiff must show that he has exhausted his remedy at law against the debtor by the issue and return of an execution unsatisfied in whole or in part.

An execution issued after the death of the debtor, without notice to his representatives or permission of the surrogate, will not meet the requirement, as such an execution is prohibited (Code Civ. Pro. § 1379) and is absolutely void.

The validity of the execution may be assailed in the creditor's suit.

Where, therefore, in such an action the fact of the death of the debtor before the issuing of the execution was set forth in the answer, and it appeared that the debtor died on the same day, but before the execution was issued, *held*, that it was void; and so, that the action was not maintainable.

Also *held*, the fact that the defendant, the grantee of the debtor, was appointed his executrix for the purposes of appeal after the return of the execution, and caused herself to be made a party to the action in which the judgment was rendered, did not affect the question, as prior to her becoming a party the invalidity of the execution was conclusively settled.

It seems, that such an action may be maintained by a judgment creditor in behalf of all the creditors, without the issuing and return of an execution, upon refusal of the representatives of the deceased debtor to bring it.

The complaint in such an action should set up the refusal and the representatives should be made parties defendant.

N. T. Bank v. Wetmore (124 N. Y. 241), distinguished.

Reported below, 8 Misc. Rep. 420.

(Argued March 4, 1895; decided March 19, 1895.)

APPEAL from order of the General Term of the Superior Court of the city of New York, made at the May term, 1894, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and ordered a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

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Statement of case.

Geo. F. Bentley and William R. Wilder for appellant. The execution against the property of William H. Bowden, issued on the 8th day of July, 1892, and returned wholly unsatisfied, was perfectly valid and regular. (Code Civ. Pro. §§ 1380, 2648; Laws of 1892, chap. 677; Laws of 1894, chap. 447; *Homan v. Liswell*, 6 Cow. 659; *Marvin v. Marvin*, 75 N. Y. 240; *Connell v. Moulton*, 3 Den. 15; *People v. N. Y. C. R. R. Co.*, 28 Barb. 284; *Phelan v. Douglass*, 11 How. Pr. 193; *Small v. McChesney*, 3 Cow. 19; *Jones v. Porter*, 6 How. Pr. 286; *Middlebrook v. Travis*, 22 N. Y. Supp. 672; *Jones v. P. Bank*, 5 Humph. 610; *P. Bank v. M. Bank*, 11 Mass. 204; *In re Welman*, 20 Vt. 653; *Duffy v. Ogden*, 64 Penn. St. 240; *Rush v. Van Benschoten*, 1 How. Pr. 149; *Lester v. Garland*, 15 Ves. 248; *Wright v. Mills*, 4 H. & N. 488; *Queen v. St. Mary*, 1 El. & Bl. 816; *Jones v. Ealer*, 8 W. L. Jour. 500; *Arnold v. United States*, 9 Cranch, 104; *McGill v. Bank*, 12 Wheat. 511; *Lough v. Outerbridge*, 143 N. Y. 271; *Town of Mentz v. Cook*, 108 id. 504; *Ostrander v. Weber*, 114 id. 102; *Harper v. Hill*, 35 Miss. 63; *Skelton v. Hamilton*, 23 id. 496; *Renaud v. O'Brien*, 35 N. Y. 97; *Hughes v. Wilkins*, 37 Miss. 483.) In any event the case at bar must be held to be an exception to the rule and doctrine laid down in *Adsit v. Butler* (87 N. Y. 585). (*N. T. Bank v. Wetmore*, 124 N. Y. 241; *Harvey v. McDonnell*, 113 id. 526; *Wetmore v. Wetmore*, 29 N. Y. Supp. 440; *Le Fevre v. Phillips*, 30 id. 709; *Ottman v. Cooper*, 81 Hun, 536; *Cuyler v. Ensworth*, 6 Paige, 34; *Brinkerhoff v. Brown*, 4 Johns. Ch. 674; *Shaw v. Dwight*, 27 N. Y. 244; *Case v. Beauregard*, 101 U. S. 690; *Valentine v. Richardt*, 126 N. Y. 272, 277; *Dudley v. St. Francis*, 138 id. 459; *Barnard v. Gantz*, 140 id. 251, 255.) William H. Bowden, upon the filing of the administrator's bond, upon which he was a surety, became the debtor of Marie Carleton, and she was an actual creditor of said Bowden in the sum of \$3,250 at the time of the alleged fraudulent conveyances. (*State v. Howarth*, 48 Conn. 207; *State v. Gracey*, 96 Penn. St. 70; *Lee v. Lee*, 67 Ala. 406; *Cook v. John-*

son, 12 N. J. Eq. 52.) By the transfers of his real estate to his wife, which were recorded August 7, 1891, William H. Bowden became and rendered himself actually insolvent and unable to respond to his creditor, Marie Carleton. (*Reiper v. Poppenhauser*, 43 N. Y. 68; *Marsh v. Dunkel*, 25 Hun, 169; *Herrick v. Borst*, 4 Hill, 652.) These conveyances were made by William H. Bowden and accepted by his wife, this appellant, with the fraudulent intention of thereby defeating the claim of the infant creditor Carleton. The transaction is stamped with all the *indicia* of fraud. (*Fuller v. Brown*, 76 Hun. 557; *Reynolds v. Robinson*, 64 N. Y. 593; *Sands v. Hildreth*, 14 Johns. 493; *Swift v. Lee*, 65 Ill. 343; *Horton v. Dewey*, 53 Wis. 410; *Seward v. Jackson*, 8 Cow. 406; *Erickson v. Quinn*, 47 N. Y. 410; *Dunlap v. Hawkins*, 59 id. 346; *Cole v. Tyler*, 65 id. 78; *Smith v. Reid*, 134 id. 575.) The intention being fraudulent, it matters not whether the consideration for the transfers was good, valuable, adequate and sufficient, or the reverse. (*Stimson v. Wrigley*, 86 N. Y. 322; *Billings v. Russell*, 101 id. 226.) The effect of these transfers being to defeat the claim of Marie Carleton, the law will disregard the actual motives or intent of both the grantor and grantee, and will presume that they were fraudulent and corrupt. (*Cole v. Tyler*, 65 N. Y. 77; *E. S. M. Co. v. Grant*, L. R. [17 Ch. Div.] 122; *Moore v. Wood*, 100 Ill. 451; *Ford v. Williams*, 24 N. Y. 359; *Edgell v. Hart*, 9 id. 213; *Wilson v. Robertson*, 21 id. 587, 593; *Kiskerbock's Appeal*, 51 Penn. St. 485.) The exceptions taken by defendant on the trial, and those filed to the findings of fact and conclusions of law, and refusals to find as by the defendant requested, are untenable. (*Spencer v. Cuyler*, 17 How. Pr. 157; *Hoffman v. Duncan*, 27 N. Y. Supp. 658; *Conboy v. Cunningham*, 24 id. 75; *Penfield v. Sage*, Id. 994; *White v. Balta*, 27 id. 902; *Sayles v. De Graff*, 82 Hun, 73; *Barnard v. Gantz*, 140 N. Y. 251; *Clark v. State*, 142 id. 101; *In re Cottrell*, 95 id. 332.)

Benjamin Patterson for respondent. No execution was issued during the lifetime of the judgment debtor, and no

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proceedings for leave to issue execution after his death were ever had. The execution issued after his death was, therefore, void. (*Adsit v. Butler*, 87 N. Y. 585; Code Civ. Pro. §§ 1879-1881; *Wallace v. Swinton*, 64 N. Y. 188; *Woodcock v. Bennett*, 1 Cow. 711; *Stymets v. Brooks*, 10 Wend. 207; *Campbell v. Rawdon*, 18 N. Y. 412.) The rule with regard to fractions of a day has no application to this case, in view of the language of section 1379, but even that rule, if applied, cannot help out the void execution here. (*C. T. Co. v. Hayward*, 10 Wend. 420; *Marvin v. Marvin*, 75 N. Y. 240; *Haden v. Budensieck*, 49 How. Pr. 241; *Patterson's Appeal*, 96 Penn. St. 93.) Appellant's claim, that the execution cannot be attacked collaterally, is untenable. (*Lichtenberg v. Hertfelder*, 103 N. Y. 302.) The plaintiff has failed to prove that the conveyances were made by the deceased, William Bowden, with intent to hinder, delay and defraud creditors, especially in that he has failed to show that the deceased was rendered insolvent by making the conveyance of June 4, 1891. (*Kain v. Larkin*, 131 N. Y. 300; 2 R. S. 137, § 1.

FINCH, J. There is no ambiguity in the character and scope of this action. It is brought by a judgment creditor against the grantee of his debtor to set aside a conveyance of land as made in fraud of creditors and to appropriate the property to the payment of the debt. The plaintiff sues for herself alone and in her own sole right as judgment creditor. She joins no other creditors and does not sue for their benefit, but exclusively for her own. It is of course a necessary condition of a right to invoke the aid of equity in such a case that the creditor should have first exhausted her remedy at law by the issue and return of an execution unsatisfied in whole or in part. The plaintiff issued such an execution, but not until the debtor was dead. That death occurred between seven and eight o'clock in the morning and the execution was issued four or five hours later on the same day. The court below has held that the execution was nugatory and abso-

lutely void, and cannot serve as a fulfillment of the condition precedent to the maintenance of the action. The whole controversy turns upon that point. It is technical in its character, and yet the rule subserves an important and substantial purpose. Equity intervenes always for a reason and never needlessly: and, declining its relief when there is a sufficient and adequate remedy at law, is obliged to say by what proof it shall be established that the remedy at law has been tried and failed. It has selected for that proof the issue and return of an execution, both because that is the natural and usual mode of enforcing the legal right, and because it is easy to prove or disprove and involves no necessary dispute. We are not at liberty, therefore, to disregard it as a needless and unmeaning ceremony.

An execution against the property of a dead man, without notice to his representatives or the permission of the surrogate, is wholly unauthorized. The Code explicitly forbids it (§ 1379), except as provided in the next two following sections. These provide that the leave of the court which rendered the judgment and of the proper surrogate must be first obtained, and the mode and manner of securing the permission is pointed out. Without such permission the execution is forbidden, and not merely voidable but absolutely void. We so held in *Wallace v. Swinton* (64 N. Y. 188). The appellant seeks to escape the effect of that case upon the ground that it declares the execution absolutely void against those who are not made parties to proceedings authorized by law for revival of the judgment against their property, and that the defendant is in fact executrix of the deceased judgment debtor and caused herself to be made a party to the judgment for the purposes of an appeal. But she did that five weeks after the execution had been returned, and when the invalidity of that writ was already conclusively settled. Cases also are cited in which it has been held that such an execution is merely voidable, but they are of little utility because entirely unaffected by a peremptory statute forbidding utterly the issue of such an

execution, except only after the prescribed notice and permission. It is urged also that the validity of the execution cannot be assailed collaterally. The cases declaring that doctrine are cases of irregularity merely, and not those in which the execution was absolutely void. It is further said that there are exceptions to the general rule requiring the issue and return of an execution, and one of them is when that preliminary step is impossible. But it was not necessarily impossible in the present case. On a proper application leave might have been granted. The truth is the plaintiff is seeking an advantage for herself above and beyond that belonging to the other creditors of the deceased. Our whole theory of administration rests upon the idea that when a man dies his estate shall answer to his creditors equally and without preference, and the surrogate is purposely made master of the situation to prevent inequality of payment. This plaintiff could undoubtedly have maintained an action for the benefit of all the creditors, after refusal of the representatives, to set this conveyance aside, but instead of that she is seeking, by an ordinary creditor's action, to secure payment of her own debt regardless of what may happen to others. For the effort now made to turn the action into one of the permitted character has too many difficulties in the way to succeed. Something of that kind was done in *National Tradesman's Bank v. Wetmore* (124 N. Y. 241), but there the question was not raised by the answer, while here the facts which raise it are fully pleaded. The death of the debtor before the issue of execution, the probate of his will, the appointment of John S. Wetherley and the defendant Ellen Bowden as executors are each alleged. If a request to Ellen as executrix to disaffirm her own title would be needless because absurd, that fact is not true of the executor, and his right cannot be arbitrarily set aside. And where the creditor may sue in behalf of the representatives refusing to do their duty, that fact should be alleged and such representatives be made parties defendant. (*Harvey v. McDonnell*, 113 N. Y. 531.) The executor Wetherley is not made a party at all, and the executrix only as an

individual. The plaintiff, however, though failing in this action, may hereafter pursue the other remedy.

The order should be affirmed and judgment absolute ordered for the defendant on the stipulation, with costs.

All concur.

Order affirmed and judgment accordingly.

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RICHARD KEENAN, as Administrator, etc., Respondent, v.
THE BROOKLYN CITY RAILROAD COMPANY, Appellant.

In an action to recover damages for negligence causing the death of plaintiff's intestate, a boy five years of age, it appeared that plaintiff was the father and next of kin of the decedent. The court charged in substance that while the father had no legal claim to the earnings of the son beyond the age of twenty-one years, he could compel the son to support him in his old age, and the jury had the right to consider this fact. Defendant's counsel thereupon requested the court to charge that the father had no claim on the earnings of the son after maturity, except in case the former becomes poor, unable to support himself and the son is shown to have means. The court declined so to charge. *Held*, error.

Keenan v. Brooklyn City R. R. Co. (8 Misc. Rep. 601), reversed.

(Argued March 5, 1895; decided March 19, 1895.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made May 28, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict and also affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Matthew Hale for appellant. The court erred in denying the motions to dismiss the complaint. (*Stone v. D. D., etc., R. R. Co.*, 115 N. Y. 104; *Davenport v. B. C. R. R. Co.*, 100 id. 632; *Kuntz v. City of Troy*, 104 id. 351; *Fenton v. S. A. R. Co.*, 126 id. 625; *Winterfield v. S. A. R. Co.*, 49 N. Y. S. R. 435; *Bulger v. A. R. R. Co.*, 42 N. Y. 459; *Baker v. E. A. R. Co.*, 62 Hun, 39; *Jaquinto v. B. & S.*

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A. R. Co., 2 Misc. Rep. 174; *Dudley v. Westcott*, 44 N. Y. S. R. 882; *Cosgrove v. Ogden*, 49 N. Y. 255; *Birkett v. K. I. Co.*, 110 id. 504; *Huerzeler v. C. R. Co.*, 139 id. 490; *Ehrman v. B. C. R. Co.*, 131 id. 576; *Murphy v. Orr*, 96 id. 14.) The court erred in its refusal to charge. (Code Crim. Pro. § 914; *Volans v. Owen*, 74 N. Y. 526; *Stevens v. Cheney*, 36 Hun, 1.)

Rufus O. Catlin for respondent. The motions to dismiss the complaint were properly denied. (*Birkett v. K. I. Co.*, 110 N. Y. 504; *Stone v. D. D. & B. R. R. Co.*, 115 id. 104; *Thurber v. H. R. R. Co.*, 60 id. 333.) The trial court would not have been justified in taking the question of the parent's negligence from the jury, but it was properly a question to be determined by them upon all the evidence. It is not negligence, as matter of law, for a parent to allow a child of the age of plaintiff's intestate to go upon the street to play. (*Murphy v. Orr*, 96 N. Y. 14; *Moebus v. Herrmann*, 108 id. 353; *Birkett v. K. I. Co.*, 110 id. 504; *Huerzeler v. C. F. R. R. Co.*, 139 id. 490; *Stone v. D. D. & B. R. R. Co.*, 115 id. 104; *Kuntz v. City of Troy*, 104 id. 344; *Wendell v. N. Y. C. R. R. Co.*, 91 id. 420.) The refusal of the court to charge as a proposition of law that the father has no claim on the earnings of the son beyond the age of twenty-one years, except in case the father becomes poor, unable to support himself and the son is shown to have means was not error. (*Hine v. Bowe*, 114 N. Y. 350, 357; *Conley v. Meeker*, 85 id. 618; *Raymond v. Richmond*, 88 id. 671; *Moody v. Osgood*, 54 id. 488; *Birkett v. K. I. Co.*, 110 id. 504.)

HAIGHT, J. This action was brought to recover damages for negligently causing the death of the plaintiff's intestate.

The deceased was a boy five years of age, and the plaintiff, Richard Keenan, was his father and next of kin.

In submitting the case to the jury, the trial judge charged, upon the question of damages, that, "In an action for the loss of services of a child by the father, the limit of recovery is

twenty-one years of age; but in deciding this case you may take into account, if you find it to be probable that this boy might have lived beyond the age of twenty-one years, and you may compensate the father for whatever age you find the probabilities of the case to be that this boy would have lived."

The defendant's counsel then requested the court to charge "that the father has no legal claim to the earnings of the son beyond the age of twenty-one years." The court charged that that was so as an abstract proposition of law, but added "that the father could compel the son to support him in his old age, and the jury had a right to consider that fact in deciding the facts of this case." Thereupon the defendant's counsel further requested the court to charge, as a proposition of law, "that the father has no claim on the earnings of the son beyond the age of twenty-one years, except in case the father becomes poor, unable to support himself, and the son is shown to have means." The court declined to so instruct the jury, and an exception was taken by the defendant's counsel.

The Code of Criminal Procedure (§ 914) provides that "the father, mother and children of sufficient ability of a poor person who is insane, blind, old, lame, impotent or decrepit so as to be unable by work to maintain himself, must, at their own charge, relieve and maintain him."

It will be observed that in the request to charge the expression occurs, "is shown to have means," whilst in the Code we find the words, "of sufficient ability." But we think the fair construction and meaning of the two phrases are the same, were so understood and that the request was proper. Does the request state an abstract proposition of law not involved in this case? The jury, in determining the amount of damages that should be awarded, was in duty bound to consider the various elements of pecuniary loss sustained by the father. First, the probable earnings of the son during his minority over and above his support, clothing and education; next, the probability of his living and becoming of sufficient

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ability to support his father in case of his becoming aged, poor and unable to support himself; and then they had the right to consider the amount he would have brought to his next of kin while living and their prospect of inheriting from him after death. (*Johnson v. Long Island R. R. Co.*, 80 Hun, 306; affirmed in this court, 144 N. Y. 719.)

The father had no right to the earnings of the son as such after he became twenty-one years of age. The charge as made left this question in doubt, and the remark of the court to the first request was to the effect that the father could compel the son to support him in his old age, without reference to his condition or inability to support himself. To make this proposition clear and eliminate the question of the earnings of the son after he became twenty-one years of age, the second request was made, and it appears to us that it was proper and the charge should have been made.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except GRAY, J., not sitting.

Judgment reversed.

FRANK S. BENSON et al., Respondents, v. AUSTIN CORBIN et al., Appellants.

Where in a will there is a clear and certain devise of a fee, about which the testamentary intention is obvious and without ambiguity, the estate thus given will not be cut down or lessened by subsequent words which are ambiguous or of a doubtful meaning.

The will of B. gave to his wife the use and occupation of two dwelling houses during life, and provided that "in case of the sale of either or both with her consent the income of the principal shall be paid to her;" he then devised said dwelling houses to two children, subject to the life occupancy of their mother, and also devised to them all his other real estate subject to her dower right. By a subsequent clause it was provided that in case of the death of both of the children without issue the property devised to them "and their issue" shall not pass to the branches of his own or his wife's family, but is "given, devised," etc., to a beneficiary named. In an action for specific performance of a con-

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tract for the purchase of a portion of the real estate of which the testator died seized, wherein the question as to the validity of plaintiff's title depended upon the construction of the will, it appeared that aside from the two dwelling houses the testator's real estate consisted principally of a large tract of sandy and barren land on the sea shore from which he had been selling lots for summer homes, and which was only valuable for such purposes. *Held*, that the death without issue referred to in the devise over meant a death in the lifetime of the testator, and as the two children named survived the testator they took an absolute fee in all the lands subject to their mother's life estate and dower right.

Reported below, 78 Hun, 202.

(Argued March 6, 1895; decided March 19, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 14, 1894, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

This action was brought to enforce the specific performance by the defendants Austin Corbin and Charles M. Pratt of a contract to purchase from plaintiffs certain real estate situated upon Montauk Point in the county of Suffolk. Said defendants refused to complete their purchase on the ground that plaintiffs were unable to convey a good and merchantable title for the reason that there was, under the will of Arthur W. Benson, deceased, through which plaintiffs derived their title, an outstanding contingent vested interest in the defendant, the Domestic and Foreign Missionary Society of the Protestant Episcopal Church.

The provisions of said will, so far as referred to in the opinion, are as follows:

"*Third*. I give and bequeath to my beloved wife the use of my house, 214 Columbia Heights, and my house at Montauk, and all their contents during her natural life, and in case of the sale of either or both with her consent the income of the proceeds shall be paid to her.

"*Fourth*. I give and bequeath to my relatives and friends the sums set against their respective names:

" Henry J. Benson, my brother, if he survives me, two thousand dollars (\$2,000).

" Sarah E. Johnson, my sister, or her children if she dies, two thousand dollars (\$2,000), and all her debt to me.

" John Benson, my brother, if he survives me, two thousand dollars (\$2,000).

" George Benson, my half-brother, if he survives me, two thousand dollars (\$2,000).

" Elizabeth Kate Barrows, my stepsister, if she survives me, two thousand dollars (\$2,000).

" Thomas M. Braine, my old clerk, if he survives me, one thousand dollars (\$1,000).

" In all eleven thousand dollars.

" *Fifth.* After the payment of the legacies in Section Four, and all the expenses of administration, I give and bequeath one-third of my personal estate to my beloved wife, Jane Ann Benson.

" *Sixth.* I give and bequeath to my son, Frank Sherman Benson, one-sixth part of my personal estate.

" *Seventh.* I give and bequeath to the United States Trust Company of New York, of which John A. Stewart is President, one-sixth part of my personal estate, in trust, nevertheless, to pay the interest, dividends and coupons to my son, Frank Sherman Benson, during his natural life, and on his death to pay the said principal sum to his child or children, share and share alike, or to the issue of such child or children, and if he shall die leaving no surviving issue, then they shall pay it to the child or children of Mary Benson, share and share alike, or to the issue of such child or children.

" *Eighth.* I give and bequeath to the United States Trust Company aforesaid, the remaining one-third of my personal estate in trust, nevertheless, to pay the interest, dividends and coupons to my daughter, Mary Benson (without any interference of her husband, if she shall marry), during her natural life, and on her death they shall pay the said principal sum to her child or children, share and share alike, or to the issue of

such child or children, but if she shall die leaving no issue, then they shall pay the same to the child, children or issue of Frank Sherman Benson; and in case of the death of both of my children, leaving no issue them surviving, then I order that they shall pay the whole sum bequeathed to both of my children to the Domestic and Foreign Missionary Society of the Protestant Episcopal Church of the United States of America, for the use of the society, to be expended for current expenses within ten years. And the said Trust Company are directed not to sell the securities so turned over to them, but to hold them till they fall due, and when they are paid off to invest the money in Government bonds, or railroad bonds, or some other very good security, looking more to the security of the principal than to the rate of interest.

"Ninth. I give, devise and bequeath to my son, Frank Sherman Benson, and my daughter, Mary Benson, share and share alike, my house in Brooklyn, 214 Columbia Heights, and my house at Montauk, and all the contents of both, subject to the life occupancy of their mother, and also all my land in Easthampton, Amagansett, Napeag and Montauk, and any and all my other lands wherever situated, subject to the dower right of their mother.

"Tenth. It is my will that in case of the death of both of my children leaving no issue, that all my property given and devised to such children and their issue, shall not pass to the branches of my family, or the family of my wife, but that all of it, personal or real, which I have the power to will, and also the trust fund heretofore set apart for income to my wife, is hereby given, devised and bequeathed to the Domestic and Foreign Missionary Society of the Protestant Episcopal Church for the use of the Society, to be expended for the current expenses within ten years."

At the foot of the will was the memorandum: "Having in my lifetime given away large sums of money in charity, I give what is left to my wife and children, with the injunction to them to continue such charitable contributions so far as they are able."

Further facts are stated in the opinion.

E. B. Hinsdale for appellant. The general rule is that the death which gives effect to a devise over is a death within the testator's lifetime, unless the language used in the will indicates a different intention. (*Quackenbos v. Kingland*, 102 N. Y. 128; *Austin v. Oakes*, 117 id. 577, 595; *Fowler v. Ingersoll*, 127 id. 472, 477; *Vanderzee v. Slingerland*, 103 id. 47.) There are, however, numerous exceptions to the general rule pointed out in the authorities. This is one of the cases to which the exceptions apply. (*Vanderzee v. Slingerland*, 103 N. Y. 47; *Mead v. Mabin*, 131 id. 259; *Nellis v. Nellis*, 99 id. 505; *Buel v. Southwick*, 70 id. 581; *In re N. Y., L. & W. R. R. Co.*, 105 id. 89; *Hennessey v. Patterson*, 85 id. 91.) The intention of the testator is sought to be arrived at in the construction of a will. In construing this will we need, therefore, to explore the whole instrument to see if there is any evidence of an intention in the mind of the testator, "other than that disclosed by the words of absolute gift," which takes this will out of the arbitrary rule stated by the courts, and establishes the clear intent of the testator that the devise over should take effect upon the death of his children without issue at any time, rather than in the event of his children not surviving him. (*Scholt v. Moll*, 132 N. Y. 122; *Crosier v. Bray*, 120 id. 366.)

Julien T. Davies and *Byron Traver* for Missionary Society, appellant. The testator's intention as to the ultimate and final disposition of his property under the will in question was that in the event of both of his children dying leaving no issue, at any time, "his property should not pass to the branches of his family or the family of his wife," but should go to this missionary society. (*In re Denton*, 137 N. Y. 428; *Mead v. Maben*, 131 id. 255; *Vanderzee v. Slingerland*, 43 id. 47; *Britton v. Thornton*, 112 U. S. 526; *O'Mahoney v. Burdett*, L. R. [7 H. L.] 388; *Buel v. Southwick*, 70 N. Y. 581; *Nellis v. Nellis*, 99 id. 505; *Hennessey v. Patterson*, 85 id. 91; *Sherman v. Sherman*,

3 Barb. 385.) The appellant missionary society has capacity to take these lands. (Laws 1846, chap. 331 ; Laws 1867, chap. 374 ; Laws 1889, chap. 191 ; Laws 1891, chap. 553.)

Daly, Hoyt & Mason and *George M. Van Hoesen* for respondents. The words of the 9th clause are sufficient, if there is nothing in the will to the contrary, to give testator's son and daughter an estate in fee with the absolute power of disposition. (*Helmer v. Shoemaker*, 22 Wend. 136 ; *Roseboom v. Roseboom*, 81 N. Y. 357 ; *Charter v. Otis*, 41 Barb. 533.) If there is nothing in the will to the contrary, the death of the two children without leaving issue would, in a devise of real property, be construed as meaning their deaths during the lifetime of the testator. (*In re N. Y. & L. R. R. Co.*, 105 N. Y. 92 ; *Vanderzee v. Slingerland*, 103 id. 55 ; *Fowler v. Ingersoll*, 127 id. 477 ; *Washbon v. Cope*, 144 id. 297.) If the two children had but a life estate, and the contingency should happen of both dying leaving no heirs, the missionary society could take but one-half of the estate devised, and the remaining half in the land would be undisposed of. (*Vernon v. Vernon*, 53 N. Y. 361 ; *Lupton v. Lupton*, 12 Johns. Ch. 623.) Where it appears by the devise itself, or from any other words in the will, or from the general scheme of the will, that the intention was that the devisee was to take the estate in fee with the absolute power of disposition, a subsequent clause, giving a contingent remainder, is void as inconsistent with and repugnant to the estate already given. The two dispositions being inconsistent with each other, the latter one fails and is void, for a valid executory devise cannot subsist under an absolute power of alienation in the first taker. (*Van Horn v. Campbell*, 100 N. Y. 294 ; *Helmer v. Shoemaker*, 22 Wend. 137 ; *Jackson v. Bull*, 10 Johns. 295 ; *Jackson v. Robins*, 15 id. 169 ; 16 id. 537 ; *Campbell v. Beaumont*, 91 N. Y. 468 ; *McDonald v. Walgrave*, 1 Sandf. Ch. 274 ; *Idé v. Idé*, 5 Mass. 500 ; *Wilson v. Doe*, 4 Leigh, 408 ; *Riddock v. Cohen*, 4 Rand, 545 ; *Cook v. Walker*, 15 Ga. 459.) A fee once given is not cut down, except by clear intention.

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Opinion of the Court, per FINCH, J.

(*Clark v. Leup*, 88 N. Y. 232; *Byrnes v. Stilwell*, 103 id. 460; *Roseboom v. Roseboom*, 81 id. 359; *Freeman v. Coit*, 96 id. 68; *Campbell v. Beaumont*, 91 id. 466; *Vanderzee v. Slingerland*, 103 id. 47; *In re McClure*, 136 id. 231; *Ferry v. Wiggins*, 47 id. 517; *Helmer v. Shoemaker*, 22 Wend. 138.) The provision in the 3d clause respecting the dwelling houses is to be considered in connection with the devise to them of all his real estate in the 9th clause; for, in determining what a testator meant, every part of the will must be considered and the natural ordinary meaning of the words of a particular clause may be modified by other provisions. (*Mullaly v. Sullivan*, 136 N. Y. 231.) That testator meant by the devise in the 9th clause that they should have the disposition of the property devised by it and could dispose of it subject to their mother's right of dower, appears further by the nature of the real property which the court may look into to fully understand what he meant by the language used in the will. (*Doe v. Provost*, 4 Johns. 63; *Van Horn v. Campbell*, 100 N. Y. 294; *Helmer v. Shoemaker*, 22 Wend. 137; *Jackson v. Bull*, 10 Johns. 295; *Jackson v. Robins*, 15 id. 169; *Campbell v. Beaumont*, 91 N. Y. 468.) Extrinsic evidence was admissible to show situation of testator. (*Stinson v. Vrooman*, 99 N. Y. 70; *Shulter v. Johnson*, 38 Barb. 81; *Terpenning v. Skinner*, 30 id. 377; *Charter v. Otis*, 41 id. 525.)

FINCH, J. The only question presented by this appeal arises upon the construction of the will of Arthur W. Benson, and comes to us as the decisive inquiry in an action to compel the defendants, Corbin and Pratt, to specifically perform a contract for the purchase of land. The point of dispute is over the title proffered by the vendors; concededly good if their construction of the will shall prevail, but not to be forced upon the vendees if their view of the title shall prove to be correct.

By the ninth clause of that will the testator devised to his son Frank and his daughter Mary his house in Brooklyn and that at Montauk with all their contents, but subject to the life occupancy of the mother, which had previously been secured

to her by the gift of a life estate, and further devised to the two children all the testator's lands wherever situated, subject to the dower right of their mother. By force of this provision, regarded by itself and as unrestricted and unqualified by any other limitation, the two children took an absolute fee in all the lands of the testator, subject only to the mother's life estate in the two houses and to her right of dower. The statute provides that words of inheritance shall not be necessary to create a fee, but the whole estate of the testator shall pass unless the intent to pass a less estate shall appear by direct words or by necessary implication. The testator subsequently refers to what he supposed himself to have done, and speaks of having given and devised his whole property to his children "and their issue," showing that he perfectly understood their interest to be a fee by the added words of inheritance. The estate thus given is not cut down, or in any manner modified, unless it be by the succeeding and tenth paragraph of the will, which raises the question submitted for our decision. That clause reads thus: "It is my will that in case of the death of both of my children, leaving no issue, that all my property given and devised to such children and their issue shall not pass to the branches of my family, or the family of my wife, but that all of it, personal or real, which I have the power to will, and also the trust fund heretofore set apart for income to my wife, is hereby given, devised and bequeathed to the Domestic and Foreign Missionary Society of the Protestant Episcopal Church, for the use of the society, to be expended for the current expenses within ten years." The inquiry now is whether the death without issue means in the lifetime of the testator, or at any time when the event occurs, whether before or after his decease. There is no dispute as to the general rule of construction. It is thus stated in *Vanderzee v. Slingerland* (103 N. Y. 55), by Judge ANDREWS: "Where real estate is devised in terms denoting an intention that the primary devisee shall take a fee on the death of the testator, followed by a devise over in case of his death without issue, it has, I think, been uniformly held in England, and it is the

rule supported by the preponderance of judicial authority in this country, that the words refer to a death without issue in the lifetime of the testator, and the primary devisee surviving the testator takes an absolute fee." And the doctrine has been repeated as recently as *Washbon v. Cope* (144 N. Y. 297). While such is the general rule, it is said to maintain its hold somewhat weakly and with a doubtful grasp, and to yield easily to any fact or circumstance indicating a different intention. Although that is undoubtedly true, it takes on some modification by force of another rule, equally well settled, that where there is primarily a clear and certain devise of a fee, about which the testamentary intention is obvious and without ambiguity, the estate thus given will not be cut down or lessened by subsequent words which are ambiguous or of doubtful meaning. If a slight circumstance or a slender reason will in ordinary cases prevent the application of the general rule, the circumstance or the reason must be strong and decisive where the construction collides with a plain devise in fee, and forces a change of its terms by cutting it down to a lesser estate. We do not easily trade a certainty for a doubt.

I deem it a weighty consideration that a construction which follows the general rule making the death without issue relate to a death in the testator's lifetime harmonizes every word and every expression in the will and renders them all consistent and operative, while the rival construction raises an inconsistency at once, only to be remedied by lessening to a practical life estate what naturally stands as a fee, or by discarding the inconsistent limitation as repugnant to the estate devised. If the testator's purpose was to prevent a lapse, the devise in fee needs no change of terms or natural meaning: the explanation that the testator did not want his property to go to the collateral branches of the family is fit and appropriate: and the devise over to the missionary society natural and reasonable: while on the other construction the fee given in a separate clause and by itself becomes a mere life estate, with the result of narrowing and hampering the father's gift to his children, disregarding and distrusting their possible devise of

it by will in case of a failure of issue, by which process it could still be diverted from collaterals or devoted to charity, and giving it contingently to the missionary society largely at the expense of and by an injury to his children, which the surrounding facts show would be neither natural nor reasonable.

That he contemplated no such result is indicated by another fact. He plainly intended that his children should have a complete power of disposition of the lands devised, and makes it known to us in one of those incidental ways which often throw the clearest light upon the testamentary intention. While making provision for his wife, and for that purpose giving to her the use and occupation of the two houses, the possibility of a sale becoming desirable and beneficial occurs to him and he says: "In case of the sale of either or both with her consent the income of the proceeds shall be paid to her." It is evident that he meant his children to have capacity to sell at least with the mother's consent, and assumed it as a matter of course in his thought, and, therefore, provided that in such event her use should attach to the proceeds. If he had meant for them merely a contingent life estate, excluding capacity to transfer a good title, he would surely have armed them in his will with a conferred power of sale, but giving no such authority, and assuming, nevertheless, that it would exist and might be exerted, we cannot escape the conviction that he meant his children to have an absolute power of disposition provided they should live to take at all; but in the possible emergency that they might not live to take at all and so be able by deed or will to dispose of the land, then and only then did he contemplate a devise to the missionary society.

Indeed the phrasing of the tenth clause indicates what in his mind the emergency calling for a devise over to the missionary society in truth was. It was a situation in which the property would "pass" to the collaterals; that is, go to them inevitably, and because there was no power anywhere to prevent, unless he, the testator, exercised it; an emergency which the children could not master because not living to

control it. No such emergency was inevitable except in the single case of their death without issue before the will should take effect. If they survived and took the fee, descent to collaterals was not inevitable. The daughter could devise to her husband, the son to his wife, or both to some useful charity, and the testator might well trust to them to respect his wishes. There was no inevitable passing of title against which only he could provide. But just that emergency did arise if they died childless in his lifetime. In that event the land would inevitably "pass," and it was to avoid that and not to mangle the clear devise to his children that he framed the remainder over as a remedy.

His disposition of his personal estate is adverted to as indicating his meaning in the disputed clause. If the forms of expression were identical with that there used the argument would have a force greater than now belongs to it. But a significant word used in the one case is absent in the other, and a different form of expression is substituted. The testator begins with a distribution of eleven thousand dollars in six separate legacies to collateral relatives and an "old clerk," and in every instance except one he uses the expression, "if he survives me," or "if she survives me," so that he contemplated at the outset the possible death in his own lifetime of these legatees and the lapse of their legacies. His attention is drawn to the subject, he acts with reference to it by an explicit expression, and thus answers the argument addressed to us that because he was seventy-five years of age and his children only in middle life he did not contemplate their possible death before his own. It is not at all rare or unusual for an old man to think that others, though younger, may die before him. The testator then gives one-third of his personal estate to his wife and one-sixth to his son. These bequests are absolute. Then he makes two trusts, covering the other half of his personal estate, giving the income of one-sixth to his son and of one-third to his daughter; and it is in the framing of these trusts obviously meant to run on and continue after his own death that he limits cross remainders, say-

ing, if one shall die without issue surviving then the trustee shall pay to the other. The word "then" is said to mean at that time, and is used again preceding the final contingent remainder in the trust shares to the missionary society. All this the exigencies of a continuing trust very naturally required. But when he proceeds to dispose of his real estate he creates no trust, but gives the land absolutely to his children. As in the direct legacies to certain collaterals his thought ran to the possibility of a death before his own, so here it comes to him again in the contingency that by a failure of issue a lapse may carry the land to collaterals with nobody living to prevent. Therefore he frames the tenth clause, but leaves out the significant word "then" which he used when framing the trusts, and substitutes a different form of expression. He says, "in case of the death of both of my children leaving no issue." If he had written out his thought in full I think it would have run somewhat thus: I have given all my land to my children in fee; I am content that they shall do with it what they please; they may sell it, they may divide it as they shall choose; I put no restraint upon their disposition; but if neither they nor their issue live to take it and dispose of it, and by their deaths in my lifetime descent to collaterals becomes inevitable, "in that case," in that emergency which they cannot control because they are dead, I provide that the collaterals shall not take, but the missionary society shall so far as I have power to effect that result. That seems to me to have been the probable drift of the testator's thought as it finds expression in the written words. But at all events there is nothing in the will to compel an exception to the general rule that the death without issue means a death in the testator's lifetime. Personally, I have no fondness for that rule. I have never been entirely satisfied of its soundness. But it is the law of this state and I owe it an obedience easily rendered in the present case, because even without it I think I should reach the same conclusion.

For if we read the will in the light of the surrounding facts, with the knowledge and under the pressure of which the tes-

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tator acted, our construction will be further confirmed. Beyond the two dwelling houses mentioned in the will and a lot at East Hampton of little value the testator's real estate consisted of a large tract of land known as Montauk on the eastern end of Long Island, and embracing about ten thousand acres. It is sandy and barren, offering no temptation to agriculture, but was being slowly sold for summer homes to those who wanted the air of the sea. That process gave it the only visible chance of value, and the testator must have expected his children to follow his example. The last thing that would have occurred to him would have been to tie up the land by a contingency which would prevent his children from selling it in their lifetime and devising it as they pleased at their death, imposing upon them the burden of carrying it without prospect or possibility of relief. If he really meant that there is a painful sarcasm in the memorandum which he left at the foot of his will, in which he recites that he has given everything to his children and urges them to bestow large sums in charity as he himself had done. I am sure that he never doubted for a moment that he had given them his whole real property, as he said, provided only that they should be alive at his death to take it and dispose of it.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed. _____

SUSAN W. HOPKINS et al., Respondents, v. SHELDON KENT et al., Respondents, et al., Appellants.

The holographic will of K. by its terms gave to his executors all of his estate, in trust, among other things to divide the income into four equal parts, one part to be paid to his wife during life, upon her death (using the language of the will) "her share to revert to my trustees for the benefit of my three children, their heirs and assigns, under the supervision of my trustees," to each of the children one-third; the testator left another child aside from those referred to and named in said provision. In an action for the construction of the will, *held*, the testator's intent was that his widow should receive the income of one-fourth of his estate, and this vested in her an equitable life estate in the share

itself; that upon her death the purpose for which the trust was created was served, the estate of the trustees terminated, and the whole legal and equitable estate vested absolutely in the three children. (1 R. S. 677, §§ 47, 48.)

(Argued March 6, 1895; decided March 19, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 27, 1894, which affirmed a judgment construing the will of Henry A. Kent, deceased, entered upon a decision of the court on trial at Special Term.

The nature of the action, the facts and provisions of said will, so far as material, are set forth in the opinion.

Josiah T. Marean for appellants. A passive trust has never been held to be intended except in cases of gift or grant to one "for the benefit of another" *simpliciter*, in the very language of the statute, or cases in which the absolute right to possession has been expressly given to the beneficiary. (*Mott v. Ackerman*, 92 N. Y. 539, 548; *S. S. Bank v. Holden*, 105 id. 415; *Wright v. Douglas*, 7 id. 564, 567; *Elwood v. Northrup*, 106 id. 172; *Verdin v. Slocum*, 71 id. 345; *Wainwright v. Low*, 132 id. 313; *Greens v. Greene*, 125 id. 510; *Donovan v. Van De Mark*, 78 id. 244; *Vernon v. Vernon*, 53 id. 359.) The case at bar is not a case of a gift to one for the benefit of another *simpliciter*. (*Beekman v. Bonsor*, 23 N. Y. 314; 1 R. S. 728, § 55.) The testator in this case did not contemplate a separation of one-quarter of the estate from the general bulk, and an investment of it for the benefit of the widow; he directed the whole surplus to be invested, and a quarter of the income of the whole to be divided to her during her lifetime, and in the same sentence, without the separation of a comma even, follows the gift over of her share after her death for the benefit of the three children named, etc. The widow had no share of the *corpus* in the contemplation of the testator. One-quarter of the income was obviously the subject-matter of the entire clause. (*Locke v. F. L. & T. Co.*, 140 N. Y. 135.) There is nothing

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in the consequences of the failure of the trust to deter the court from freely according to the language of the will its obvious meaning. If anything the court will rather lean toward a conclusion under which the appellant will share with his brothers and sisters. (*Low v. Harmony*, 72 N. Y. 414; *Scott v. Gurnsey*, 48 id. 106.) The will contains no direction to the trustess, either express or implied, to receive the rents or profits of the land. They took, therefore, no title to the lands, but only a power comprehending a power of sale which was held, without appeal, not to be imperative and not to operate as an equitable conversion. (R. S. Uses & Trusts, § 56.)

George Zabriskie for respondents. If there be no valid trust for the widow all the remainders fail. (*Robert v. Corning*, 89 N. Y. 225; *Vernon v. Vernon*, 53 id. 351, 359; *Tobias v. Ketchum*, 32 id. 319, 328; *Gilman v. Reddington*, 24 id. 19; *Garvey v. McDevitt*, 72 id. 556; *Cooke v. Platt*, 98 id. 35, 39.) The trust is not saved by the provision giving to the widow one-fourth of the income of the entire estate. The court has no power to convert the gift of the fourth part of the entire income of the estate into a gift of the entire income of one-fourth part of the estate by setting apart so much of the capital as a fund to produce the income. (*Cochrane v. Schell*, 140 N. Y. 516, 536; *Arthur v. Nelson*, 1 Dem. 337; *Hawley v. James*, 5 Paige, 318; *Harris v. Clark*, 7 N. Y. 242; *Van Beuren v. Dash*, 30 id. 393, 426; *Holmes v. Mead*, 52 id. 332, 345; *Knos v. Jones*, 47 id. 389; *Benedict v. Webb*, 98 id. 460; *Tilden v. Green*, 130 id. 29; *Garvey v. McDevitt*, 72 id. 556.) In any event the widow is not entitled both to dower and to the benefit of the trust because the two are incompatible. (*Vernon v. Vernon*, 53 N. Y. 351; *Tobias v. Ketchum*, 32 id. 319; *Savage v. Burnham*, 17 id. 561.)

Bronson Winthrop for respondents. The legal title in the trustees is commensurate with the duration of the express trust. (1 R. S. 730, § 67; *Locke v. F. L. & T. Co.*, 140 N.

Y. 135; *Greene v. Greene*, 125 id. 510; *Cooke v. Platt*, 98 id. 38.) At the widow's death the trustees no longer have the power to collect the rents and profits and the trust ceases. (*Locke v. F. L. & T. Co.*, 140 N. Y. 144; *Vanderpoel v. Loew*, 112 id. 167; *Mott v. Ackerman*, 92 id. 578; *S. Bank v. Holden*, 105 id. 417; *Ramsey v. De Remer*, 47 N. Y. S. R. 682; *Fisher v. Hall*, 41 N. Y. 423; *Rawson v. Lampman*, 5 id. 456; *Moorehouse v. Hutchinson*, 17 N. Y. S. R. 183; *Greene v. Greene*, 125 N. Y. 506; *Post v. Hover*, 33 id. 593; *Henderson v. Henderson*, 113 id. 11.) If this construction is possible, under the language of the clause, it must be adopted. (*Roe v. Vingut*, 117 N. Y. 218; *Greene v. Greene*, 125 id. 512; *Lytle v. Beveridge*, 58 id. 598.) The disposition of one-fourth of the estate cannot fail because the testator has omitted to dispose of the residue. (3 Jarman on Wills [5th ed.], 709; *Adams v. Perry*, 43 N. Y. 487; *Cooke v. Platt*, 98 id. 35; *Greene v. Greene*, 125 id. 510.)

O'BRIEN, J. The plaintiffs, as executors of the will of Henry A. Kent, who died March 1, 1893, brought this action for the purpose of procuring a judicial construction of its several provisions. The will bears date October 23d, 1891, is holographic, and its disposing clauses read as follows:

"I, Henry A. Kent, of the city of Brooklyn, county of Kings and state of New York, do make, publish and declare this my last will and testament as follows:

"I give, devise and bequeath to my children, to wit, Susan W. Hopkins, Frances K. Sanger, Sheldon L. Kent and Henry C. Hopkins, my son-in-law, and to their heirs and assigns, all my property, whether real, personal or mixed, in trust, and I also appoint the above-mentioned trustees my executors, with instructions as follows:

"1st. To pay all my debts.

"2d. To dispose as they may think advisable for all interests of all of my property.

"3d. To invest the surplus after paying my debts in such manner as they think advisable.

"4th. To divide the income from such investments as follows in four equal parts, namely :

"To my wife, Amelia C. Kent, one part during her lifetime ; after her death her share to revert to my trustees for the benefit of my three children, their heirs and assigns, under the supervision of my trustees as above mentioned ; Susan W. Hopkins one-third, Frances K. Sanger one-third and Sheldon L. Kent one-third."

It appeared that the testator had another child, a son, Walter L. Kent, who is not mentioned in the will, and this appeal relates to his interest in the estate. The courts below have held that as to three-fourths of his estate, real and personal, the testator failed to make any valid disposition, and, consequently, died intestate as to that part. That as to the other one-fourth there was a valid trust created during the life of the widow for her benefit, with remainder over to the three children named absolutely. That the widow was entitled to dower in the lands undisposed of, and to a distributive share in the personal estate. No one appealed from this judgment except the son, Walter L. Kent, and he from that part of it only which adjudges that upon the death of the widow the remainder of her one-fourth share vests in fee in the other three children. The contention on his behalf is that there was no valid disposition made of the remainder, and that the testator died intestate as to that also. The limit of the controversy is thus reduced to a single inquiry. We may pass over the other provisions of the will, except the fourth clause for the benefit of the widow, and assume, what would seem to be entirely obvious from a glance at these provisions, that the deceased failed to create any beneficial interest in three-fourths of his estate in favor of any one, and that the trusts upon which he attempted to dispose of it are void.

It cannot be denied that the meaning of the testator, as expressed in the fourth clause, is involved in much doubt and obscurity, but it is the duty of courts in construing such a provision to so interpret it as to uphold rather than to render it void. (*Roe v. Fingut*, 117 N. Y. 218 ; *Du Bois v. Ray*, 35

id. 162; *Greene v. Greene*, 125 id. 512; *Post v. Hoover*, 33 id. 601; *Lytle v. Beveridge*, 58 id. 598.) It is quite clear that the testator intended to convey to his executors and trustees some interest in his property for the benefit of his widow during her life. While the language is not clear it is fairly to be gathered from it that he intended that she should receive the income of a share which evidently was one-fourth of his estate. The right to the income of this share, or the rents and profits of the same during her life, vested her with an equitable life estate in the share itself. This was the quantity of the estate conveyed to the trustees for the benefit of the widow. Its limit and term of duration is for the period of her life. At her death the purpose for which the trust was created is served, and, consequently, the estate of the trustees terminates and the share is released from the trust. (*Locke v. Farmers' Loan & Trust Co.*, 140 N. Y. 135; *Greene v. Greene*, *supra*; *Cooke v. Platt*, 98 N. Y. 38.) The question is, what becomes of it then or in whom is the beneficial interest vested? We think that the deceased has in effect said that this share, which, up to the time of the death of the widow was under the supervision of the trustees, shall revert to them "for the benefit of my three children, their heirs and assigns." And as there was no further active trust imposed upon the trustees, in respect to this share, the whole legal and equitable estate vested absolutely in the three children by the statute. They, and not the trustees, then became entitled to the possession and to the rents and profits, and, hence, under such circumstances, the remainder will vest in them under the provisions of the Statute of Uses and Trusts, and there can remain in the trustees no estate whatever, legal or equitable.

"§ 47. Every person who, by virtue of any grant, assignment or devise, now is or hereafter shall be entitled to the actual possession of lands and the receipt of the rents and profits thereof in law or in equity shall be deemed to have a legal estate therein of the same quality and duration, and subject to the same conditions as his beneficial interest.

"§ 49. Every disposition of lands, whether by deed or devise,

hereafter made, shall be directed to the person in whom *the right to the possession and profits* shall be intended to be invested, and not to any other to the use of or in trust for such person, and, if made to one or more persons to the use of or in trust for another, no estate or interest, legal or equitable, shall vest in the trustee."

At the death of the widow the possession, management and control of the share for her benefit terminates and that of the three children begins. The learned counsel for the defendant Walter L. Kent insists that the true construction of the provision is that the trustees, notwithstanding the death of the widow, still hold the share in trust as before for the benefit of the three children, their heirs and assigns in perpetuity, and this disposition being void the remainder fails, and, upon the death of the widow, the share vests in possession in the heirs at law. The inaccurate language of the testator of course affords a wide scope for ingenious reasoning, but to construct a perpetuity upon the life estate of the widow, for the purpose of defeating the remainder, would be not only to impute to the testator an intention quite improbable and exceedingly difficult to find, but ascribe to his words a scope and meaning which they will scarcely bear.

The interpretation given to the instrument by the court below is more in harmony with settled principles of construction, does less violence to language and is more in accord with the presumed intention of the testator.

The judgment should be affirmed, with costs to all parties out of the estate.

All concur, except GRAY, J., not sitting.

Judgment affirmed.

THERESE MURPHY, as Administratrix, etc., Appellant, v.
FRANK K. HAYES et al., Respondents.

In an action to recover damages for alleged negligence, causing the death of M., plaintiff's intestate, these facts appeared: M. was in the employ of a safe company engaged in moving a safe into defendants' building. The safe was carried up in a freight elevator to a little above the floor where it was to be placed. Other employees of the company placed pieces of iron under the front of the elevator car to sustain it, which was then lowered upon them. Said employees then went into the car, the rear portion of which began to sag down; they called out to raise the car up. The janitor of the building thereupon called down the elevator shaft to the engineer to "raise her a turn." The car was raised up even with the floor, when the janitor again called down the shaft to "stop and hold the pressure on and keep her in her place." Said employees then began to push the safe out of the car; when about half out the car rose, tipping the safe over, and M., who was in front of it, was killed. *Held*, that the complaint was properly dismissed; that defendants were chargeable with no duty with reference to the removal of the safe from the elevator; that the negligence was that of M.'s co-employees in attempting to remove the safe with the power on without notifying the engineer below or directing him to reduce the power in case the car should commence to rise.

(Argued March 7, 1895; decided March 19, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made April 14, 1894, which affirmed a judgment in favor of defendants entered upon an order of the court on trial at Circuit dismissing the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

G. Washbourn Smith for appellant. The defendants were guilty of negligence in starting the elevator and tipping the safe over, while the deceased and the rest of Marvin's men were removing it from the car. (*Coughtry v. G. W. Co.*, 56 N. Y. 124; *Ray's Per. Neg.* 18, 19; *Ackert v. Lansing*, 59 N. Y. 646; *Swords v. Edgar*, Id. 28; *Bennett*

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v. *R. R. Co.*, 102 U. S. 577; *Elliott v. Pray*, 10 Allen, 378; *Ritterman v. Ropes*, 19 J. & S. 25; *Tousey v. Roberts*, 21 id. 446; *Scott v. L. D. Co.*, 3 H. & C. 596; *Gerlach v. Edel-meyer*, 15 J. & S. 292; *Briggs v. Oliver*, 4 H. & C. 403; *Lyons v. Rosenthal*, 11 Hun, 46; *Byrne v. Boadle*, 2 H. & C. 722; *Kearney v. L. & C. R. Co.*, L. R. [6 Q. B.] 760; *Thomas v. W. U. T. Co.*, 100 Mass. 156; *Lowery v. M. R. Co.*, 99 N. Y. 161; *Mullen v. St. John*, 57 id. 567; S. & R. on Neg. [4th ed.] §§ 59, 60; *Stokes v. Saltonstall*, 13 Pet. 181.) On the question, whether the plaintiff's intestate was free from contributory negligence, the case was clearly one for the jury. (*Benzing v. Steinway*, 100 N. Y. 551; *Stringham v. Stewart*, 100 id. 516; *Doyle v. Baird*, 15 Daly, 287; *Murtaugh v. N. Y. C. R. R. Co.*, 49 Hun, 460; *Davidson v. Cornell*, 132 N. Y. 228; *Galvin v. Mayor, etc.*, 112 id. 223; *Hoag v. R. R. Co.*, 111 id. 199; *Stackus v. N. Y. C. R. R. Co.*, 79 id. 466; *Thurber v. H. R. R. Co.*, 60 id. 326; *Dervin v. Herrman*, 23 J. & S. 274.) The plaintiff had the right to prove what appliances the owners of other high buildings in the city of New York and vicinity used to keep their elevators stationary while men were removing heavy safes from them. (*Hegeman v. R. R. Co.*, 13 id. 1; *W. R. R. Co. v. McDade*, 135 U. S. 554.) The court erred in sustaining the defendants' objection to questions put to the expert witness Smith. (*Wallace v. C. V. R. R. Co.*, 138 N. Y. 302; *Galvin v. Mayor, etc.*, 112 id. 226; *Hart v. H. R. B. Co.*, 84 id. 60; *Wottrich v. Freeman*, 71 id. 601; *Tinney v. N. J. S. Co.*, 5 Lans. 509; *Nadau v. W. R. L. Co.*, 76 Wis. 120; *Crocker v. Ins. Co.*, 8 Cush. 79.)

Charles C. Nadal and *Thomas S. Moore* for respondents. The learned trial judge was correct in his ruling dismissing the complaint. (*Reiss v. N. Y. S. Co.*, 128 N. Y. 103; *Cosulich v. S. O. Co.*, 122 id. 118; *Dobbins v. Brown*, 119 id. 188; *Losee v. Buchanan*, 51 id. 476; *Heaney v. L. I. R. R. Co.*, 112 id. 122; *Riordan v. S. S. Co.*, 124 id. 655; *Ferguson v. Hubbell*, 97 id. 507; *Van Wycklen v. City of Brooklyn*, 118 id. 424; *Roberts v. N. Y. E. R. R. Co.*, 128 id. 455.)

HAIGHT, J. This action was brought to recover damages for the death of Patrick Murphy, the plaintiff's intestate, caused, as alleged, by the negligence of the defendants.

Patrick Murphy, with several others, was in the employ of the Marvin Safe Company, engaged in moving a safe weighing nine thousand three hundred pounds into the defendants' building on Maiden lane, in the city of New York, for one of the defendants' tenants therein. There were two elevators in the building opposite each other on the main hall, one of which was constructed for carrying heavy freight as well as passengers. The safe was run into the hall on the first floor and placed upon the freight elevator. The engineer of the building was then given an order to go ahead, and thereupon he applied the power and raised the car containing the safe to the seventh floor of the building, where it was to be removed and placed in the tenant's office. After the elevator had arrived at the floor of its destination the servants of the Marvin Safe Company placed two iron shoes under the front edge of the car. They consisted of two broad pieces of iron, which extended beneath the floor of the car with a double angle which projected out into the hallway. The elevator was then lowered upon the shoes, and two of the employees of the Marvin Safe Company went into the car behind the safe to assist in pushing it out into the hall. As they entered the car the rear portion thereof commenced to sag down, and they called out to raise the car up. A janitor in the defendants' employ, standing by, hallooed down the elevator shaft to the engineer to "raise her a turn; give her a turn." Thereupon the car was raised up even with the floor. He then shouted down the shaft: "Stop and hold the pressure on and keep her in her place." The car then remaining steady, the servants of the safe company took hold of the safe and pushed it out. As soon as they got it about half way out on to the floor of the hall the elevator commenced to raise, and rose gradually for the space of about three feet, tipping the safe over on to its face in the hall. The plaintiff's intestate, being in front of

the safe, was thrown over into the opposite elevator shaft, fell and was killed.

We think there can be no reasonable doubt as to the cause of the accident. The inferences to be drawn from the facts would have justified the jury in finding that the car was held in position, even with the floor of the building, through the power maintained upon the elevator by the engineer in the basement below, and as soon as the elevator was relieved in part of the great weight of the safe the car commenced to rise, because of such power, causing the safe to tip forward.

Who was at fault? Was it the defendants' engineer? Manifestly not. He was in the basement below operating the elevator according to orders received from above. He could not see or know what they were doing with the safe, or the manner in which they were removing it from the car of the elevator. He apparently obeyed the orders given him; and we discover nothing in his acts that can properly be made the subject of criticism.

Was it the janitor? He was charged with no duty with reference to the moving of the safe. So far as appears he was but a volunteer. When the men inside of the car called out to "raise her up," after finding that the rear of the car was sagging down, he shouted their orders down through the elevator shaft to the engineer. It is true that, after the car was again raised even with the floor, he again shouted down to the engineer to keep the pressure on and hold the car in place. But this was done in a loud voice, in the presence of the servants of the safe company, including Murphy, and no objection was made thereto. The order was evidently proper. It had then been demonstrated that the shoes placed under the floor of the front of the car were insufficient to hold it in place, and power from beneath was required in order to keep it from sagging down in the rear. The janitor was not shown to have had experience or knowledge in the moving of safes, or to have taken any other responsibility, or given other orders with reference thereto.

Were the defendants negligent? There is no pretense that

the elevator was not of the best construction, or that it did not do its work properly. The only thing suggested is that they did not have a man upon the elevator having hold of the rope so as to shut off the power as the safe was removed from the elevator. But they were chargeable with no duty with reference to the removal of the safe. They simply furnished the elevator operated by the engineer, with which to enable the Marvin Safe Company to effect the hoisting of the safe. The capacity of the elevator was from four to five tons. The weight of the safe, as we have seen, was upwards of four tons and a half, nearly equal to the entire capacity of the elevator. The elevator could be operated by the engineer properly, under orders from above, and, under the circumstances, it may not have been deemed prudent to burden the elevator with the weight of an additional man. We consequently see no ground for charging the defendants with negligence.

Did the accident result in consequence of the negligence of the servants of the safe company? Those servants were engaged in the removal of the safe. They were accompanied by the foreman of the gang and the general foreman of the company, men who had had many years of experience in the moving of safes in the cities of New York, Brooklyn and Jersey City, and the taking of them up in elevators in high buildings. They were fully aware of the difficulties and dangers attending the handling of safes of great weight, and understood the nature and character of the appliances necessary to be made use of in performing such work. They knew that the shoes had proved insufficient to hold the car in place, and that they had placed no skid or other appliance across the elevator shaft to hold the car in position. They knew that the elevator car was maintained in position upon the seventh floor of the building with this safe upon it, through power applied by the engineer in the basement below. They knew that there was no man upon the car having hold of the rope so as to reduce the power as the safe was removed. Yet knowing all this, they attempted to remove the safe from the elevator with the power on, without giving notice to the

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engineer below, or directing him to reduce the power in case the elevator should commence to rise. In this, it appears to us, they were negligent, and such negligence caused the death of Murphy. They were his co-servants and co-laborers, he participating with them in negligently doing the work they had in charge.

It follows that the non-suit was proper, and that the judgment appealed from should be affirmed, with costs.

All concur.

Judgment affirmed.

THE PEOPLE ex rel. THE UNION PACIFIC TEA COMPANY,
Appellant, v. JAMES A. ROBERTS, as Comptroller, etc.,
Respondent.

145 375
155 412

In proceedings by certiorari to review the appraisal of the state comptroller fixing the amount of the relator's capital stock employed within this state, the latter objected to the appraisal on the ground that it is a manufacturing company, wholly engaged in carrying on manufacture in this state. These facts appeared: The relator is engaged in the sale of spices, baking powder, coffee and tea, purchasing these articles in bulk. The spices and baking powder are merely put up by it in packages for sale. Various kinds of tea are mixed together, the compound being called and sold as "combination tea." The coffee is purchased in the raw bean, then roasted and ground, and, in some instances, different kinds are mixed together. *Held*, that this was not manufacture, and so the relator could not be regarded as a manufacturing corporation.

It seems, that the return of the comptroller to a certiorari to review his appraisal should set forth the items of the appraisal, instead of simply giving the total, and making the evidence a part of the return.

(Argued March 11, 1895; decided March 19, 1895.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made December 4, 1894, which affirmed a determination of the comptroller of the state made upon a re-hearing for re-settlement and revision of a tax assessed against the relator.

The nature of the proceeding and the facts, so far as material, are stated in the opinion.

Charles H. Luscomb for appellant. The assessment by the comptroller is erroneous and unsupported by the evidence. (*People ex rel. v. Wemple*, 133 N. Y. 323; *People ex rel. v. Campbell*, 138 id. 543; *People ex rel. v. Coleman*, 126 id. 433; *People ex rel. v. Barker*, 54 N. Y. S. R. 447.) Manufacturing or mining corporations or companies wholly engaged in carrying on manufacture within this state are exempt from state taxation. (Laws 1889, chap. 353; *People ex rel. v. Campbell*, 63 N. Y. S. R. 44; *People ex rel. v. Wemple*, 133 N. Y. 323.) The business of the Union Pacific Company is a manufacturing business. (*People ex rel. v. Wemple*, 42 N. Y. S. R. 278; 129 N. Y. 543; *People v. N. Y. F. D. D. Co.*, 98 id. 488.) As to that proportion of its business which is manufacturing, the company is entitled to exemption from taxation. (*People ex rel. v. Campbell*, 63 N. Y. S. R. 47.)

T. E. Hancock, Attorney-General, for respondent. The appellant is not a manufacturing corporation, and is subject to taxation upon the amount of capital employed in this state. (*People v. K. I. Co.*, 99 N. Y. 181; *People v. N. Y. D. D. Co.*, 92 id. 487; *Byers v. F. C. Co.*, 106 Mass. 131; *Dudley v. J. P. A.*, 100 id. 183; *Frazee v. Moffit*, 20 Blatchf. 267; *Hartraupt v. Wiegmann*, 121 U. S. 609.) The determination of the comptroller as to the amount of tax due from the appellant was correct. (*People ex rel. v. Wemple*, 133 N. Y. 323; *People ex rel. v. Wemple*, 131 id. 64; *People ex rel. v. Wemple*, 138 id. 583, 587; *People v. A. C. & D. Co.*, 129 id. 558; *People v. S. C. O. Co.*, 131 id. 64; *People v. S. T. C. Co.*, 133 id. 323.)

BARTLETT, J. This proceeding is presented upon a writ of certiorari to review the appraisal of the comptroller fixing the amount of the capital stock employed within the state by the relator, a foreign corporation organized under the laws of the state of New Jersey and having its factory and principal place of business in the city of New York.

The authorized capital of the relator is \$300,000 and the amount paid in \$212,000.

The comptroller fixed, on a first appraisal, the amount of capital employed within this state at \$259,273.93, and on a re-hearing reduced the value to \$172,677.46.

Thereupon the relator sued out a writ of certiorari to review the proceedings before the comptroller, and the General Term of the third department affirmed the assessment on the re-hearing.

The relator urges two principal objections to the appraisal made by the comptroller; first, that it is a manufacturing corporation wholly engaged in carrying on manufacture within this state; second, that there is an overvaluation of the amount of capital stock employed within this state.

The business of the relator is alleged to be the manufacture of coffee and tea, and the sale of coffee, tea, spices and baking powder in this and several other states. It appears by the uncontradicted evidence that the relator purchases its spices and baking powder in bulk, merely putting up the same in packages for sale, and the question of whether the relator is a manufacturing corporation must be determined by the manner in which it deals with its coffee and tea. The evidence discloses that tea is taken in the original state, and various kinds are mixed together, producing a compound which is called combination tea. Coffee is purchased in the raw bean, roasted, ground, and in some instances different kinds of coffee are mixed together, forming, as in the case of the tea, a combination article.

We think it very clear that the handling of tea and coffee in the manner indicated is not manufacture in any legal sense and the relator cannot be regarded as a manufacturing corporation.

Mr. Webster defines manufacture to be "anything made from raw materials by the hand, by machinery, or by art, as cloths, iron utensils, shoes, machinery, saddlery, &c."

The process of manufacture is supposed to produce some new article by the application of skill and labor to the raw material.

It is quite apparent that the processes of the relator when subjected to this test cannot be deemed manufacture either in the ordinary or legal definition of that term.

In the case of *The People v. Knickerbocker Ice Company* (99 N. Y. 181) it was held that the collecting of ice from the Hudson river and Rockland lake; storing, preserving and preparing it for sale was not a process of manufacture. This court held the defendant was dealing with ice as an existing article, and not as a manufacturer thereof by frigorific effects produced by artificial means.

Judge DANFORTH says (p. 183): "Water might be improved by filtration, fruit by judicious pruning of tree or vine, or protection by glass, sand and gravel by screening, cobblestones by selection and coal by breaking, and each by various processes stored until the season of demand, when, having been 'collected, stored, preserved and prepared for sale,' the natural article and no other would be put upon the market."

So in the case at bar the combination of teas, and the roasting, grinding and mixing of coffee are processes which result in no new article, as it is still coffee and tea that is placed upon the market.

The United States Circuit Court for the northern district of New York held that cutting grass, converting it into hay, pressing it in bales and transporting it to market did not result in the production of a manufactured article. (*Frazee v. Moffitt*, 20 Blatch. Cir. Ct. Rep. 267.)

The Supreme Court of the United States held that shells cleaned by acid and then ground on an emery wheel, and some of them afterwards etched by acid, and all of them intended to be sold as ornaments, as shells, were not dutiable as manufactures of shells. (*Hartrnft v. Wiegmann*, 121 U. S. 609.) It is unnecessary to multiply citations, as the cases referred to clearly point out the rule that governs in the case at bar.

This brings us to the question of alleged overvaluation in the appraisal by the comptroller. After a careful examination of the evidence, we are not only unable to agree with the con-

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tention of the learned counsel for the relator that legal error is disclosed by the fact that the comptroller's appraisal is contrary to the undisputed evidence, but we are of opinion that his final determination on the re-hearing is supported by the facts. We do not deem it important to review the facts in detail, as the decision below is binding upon this court.

We feel constrained, in this connection, to comment upon a practice that prevails in the comptroller's office which imposes upon this court much unnecessary labor. The return to the writ of certiorari in this case sets forth the final determination of the comptroller in fixing the amount of relator's capital stock employed within this state, but fails to disclose the items aggregating the total as ascertained, simply making the evidence taken before the commissioner a part of the return.

It will greatly facilitate the court in deciding this class of cases if the return sets forth the items of the appraisal.

The judgment and order appealed from should be affirmed, with costs.

All concur.

Judgment affirmed. _____

**In the Matter of Proving the Last Will and Testament of
WILLIAM O'BRIEN, Deceased, and the Judicial Settlement
of the Accounts of his Executors.**

Upon a final settlement of the accounts of executors, these facts appeared:

In proceedings taken before the surrogate by legatees to revoke the letters testamentary, a citation was issued, and the executors were enjoined from acting as such until the determination of the surrogate upon the application. The executors resisted the application, and the proceedings resulted in an order revoking the letters unless the executors gave a bond as prescribed by the Code of Civil Procedure (§ 2687, sub. 3), and charging them with the disbursements of the petitioners. The executors complied with the order, continued in the performance of their duties, and on the final accounting claimed a credit for the amounts they alleged they were liable to pay their counsel for services performed while they were so enjoined and for services rendered by their attorney in resisting said application. The surrogate found, upon evidence justifying the findings, that the application was unreasonably

resisted, and he disallowed the claim. *Held*, that this was within the discretion of the surrogate and, the General Term having affirmed his decree, this court could not interfere.

(Argued March 8, 1895; decided March 19, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made July 14, 1894, which affirmed a decree of the surrogate of Rensselaer county settling the accounts of the executors of the last will and testament of William O'Brien, deceased.

The facts, so far as material, are stated in the opinion.

Olin A. Martin for appellants. The case conclusively shows that the amount of \$761.93 as found by the referee, was for actual and necessary expenses, and was just and reasonable. The refusal of the surrogate to make an allowance of that amount to the executors was error. (Code Civ. Pro. § 2730; *Gilman v. Gilman*, 2 T. & C. 214; 63 N. Y. 41; *Fowler v. Lockwood*, 3 Redf. 465; *Frith v. Campbell*, 53 Barb. 325; *In re Thompson*, 41 id. 237; *Holmes v. Cook*, 2 Barb. Ch. 646; *Colegrove v. Horton*, 11 Paige, 261; *Freeman v. Kellogg*, 4 Redf. 218; *Manderville v. Manderville*, 8 Paige, 475; *Shields v. Shields*, 60 Barb. 56; *In re Hart*, 6 N. Y. S. R. 535; *Martin v. Duke*, 5 Redf. 597; *Grubb v. Hamilton*, 2 Dem. 414; *In re Sterling*, 9 Civ. Pro. Rep. 448, 451; *In re Cody*, 36 Hun, 122; 103 N. Y. 678.) It is not essential that the executors should have paid the amount of the expenses to authorize their allowance by the surrogate. (*Gilman v. Gilman*, 2 T. & C. 214; 63 N. Y. 41; *Fowler v. Lockwood*, 3 Redf. 465; *Frith v. Campbell*, 53 Barb. 325; *In re Thompson*, 41 id. 237; *Williams on Exrs.* 1137; *Stewart v. Hoare*, 2 Bro. C. C. 663; *Fearns v. Young*, 10 Ves. 184; *Atty.-Genl. v. City of London*, 1 id. 243; *Lewin on Trusts*, 557; *Beames on Costs*, 13, 157, 214; *Tiff. & Bull. on Trusts*, 697; *Wetmore v. Parker*, 52 N. Y. 450; *Woodruff v. N. Y., L. E. & W. R. R. Co.*, 129 id. 27; Code Civ. Pro. §§ 2729, 2730; *Downing v. Marshall*, 37 N. Y. 387; *Irving v.*

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De Kay, 9 Paige, 533; *In re Atty.-Genl. v. N. A. L. Ins. Co.*, 91 N. Y. 61.) The appeal from that portion of the surrogate's decree charging the executors personally with the payment of \$101.40, costs of the proceedings for their unsuccessful removal, is well taken, and that part of the decree should be reversed. (*Holmes v. Cock*, 2 Barb. Ch. 426; *Shook v. Shook*, 19 Barb. 653.)

John T. Norton for respondents. None of the orders, decisions, findings, refusals to find or decrees, referred to in the notice of appeal to the General Term, and which the appellants call "intermediate orders," are before this court for review, no adjudication having been made thereon by the General Term, no appeal to this court having been taken from any thereof and none thereof being specified in the notice of appeal. (Code Civ. Pro. §§ 1316, 2570; *In re Burnett*, 15 N. Y. S. R. 116; *In re Soule*, 46 Hun, 661; *In re Phalen*, 21 N. Y. S. R. 34; *Marvin v. Marvin*, 11 Abb. [N. S.] 99; *Platz v. City of Cohoes*, 8 Abb. [N. C.] 397; *F. L. & T. Co. v. T. Co.*, 15 N. Y. S. R. 516; *Marsh v. Avery*, 81 N. Y. 29; *Negley v. Short*, 18 Civ. Pro. Rep. 45.) Findings of fact are not reviewable in this court, except where such findings are wholly unsupported by competent evidence. (*In re Ross*, 87 N. Y. 514; *Davis v. Clark*, 87 id. 623; *In re Cottrell*, 95 id. 329; *In re Valentine*, 100 id. 607; *Howlett v. Elmer*, 103 id. 156; *Kingsland v. Murray*, 133 id. 170; *In re Bolton*, 141 id. 554.) The unpaid bills of Mr. Ludden and Mr. Griffith were properly disallowed by the surrogate. Neither the surrogate nor the Surrogate's Court has jurisdiction to allow unpaid counsel bills. (Code Civ. Pro. §§ 2561, 2562; *Devin v. Patchin*, 26 N. Y. 441; *Reed v. Reed*, 52 id. 651; *In re Bailey*, 14 N. Y. S. R. 325; *Clock v. Chadeagn*, 10 Hun, 97.) The surrogate properly held that, in the absence of the supporting affidavit required by statute, and in the absence of supporting vouchers, he had no power to allow any of these items. (Code Civ. Pro. § 2729; *Matter of De Graw*, 23 N. Y. Supp. 848.) The burden of proof was upon the contestant

to show that the services of counsel charged for were unnecessary and that the amount charged was unreasonable. (*Raymond v. Dayton*, 4 Den. 333.) The charges of Mr. Ludden, amounting in the aggregate to \$312, and the charge of Mr. Griffith of \$175, less three or four consultations, for services to the executors in the proceeding to remove them from office, were not a proper claim for reimbursement. (2 Rumsey's Pr. 451; Code Civ. Pro. § 2687; *Gilman v. Gilman*, 2 Lans. 7.)

PECKHAM, J. We think the judgment in this case should be affirmed. The surrogate referred certain questions arising upon the presentation of the final accounts of the executors to a referee to take the testimony and report the same to the surrogate with his opinion thereon. The referee did so and reported in favor of paying the executors a certain amount, including sums which they claimed to be liable for to their counsel for services rendered them as executors in the course of the administration of the estate. The referee made certain findings which upon the return of the testimony to the surrogate were not sustained by that officer, but other findings were made. There is really no dispute in regard to the evidence, and the surrogate found facts by reason of which he refused to allow the executors the sums which they claimed to be liable to pay to their counsel as above stated. It appears from these findings that proceedings were taken by some of the legatees before the surrogate to revoke the letters testamentary of the executors on the ground that their circumstances were such that they did not afford adequate security to the persons interested in the due administration of the estate. (Subd. 5, § 2685, of the Code Civ. Pro.)

A citation was issued by the surrogate to the executors to show cause why their letters testamentary should not be revoked, and in that order to show cause they were enjoined from acting as executors until the determination by the surrogate of the application for such revocation. The executors showed cause by written answers and the issues raised therein

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were settled by the surrogate and referred to a referee for the purpose of taking testimony, and upon the return and presentation of such testimony the surrogate decided to revoke the letters of the executors unless they gave a bond in an amount stated, under the authority of subdivision 3 of section 2687 of the Code. The surrogate also charged the executors with the amount of the disbursements of the petitioners. The executors subsequently complied with the decree of the surrogate and gave the bond and went on with the discharge of their duties. When the question upon their final account came up the executors claimed the right to be credited in their accounts with the amounts which they alleged they were liable to pay to their counsel for services performed for the executors during the time when the latter were enjoined from performing any duties as executors, and also for the services rendered by their attorney for them in resisting the application of the petitioners to revoke their letters testamentary, which resulted in the granting of the application unless the executors gave the bond as above mentioned. The surrogate found that this application was unreasonably resisted and that the executors were not entitled to an allowance for services of counsel to them in that proceeding, nor while they continued to act as executors while the order restraining them from so acting was in existence. It also appeared in the evidence and was found by the surrogate that the counsel fees for these services had not in fact been paid by the executors at the time that they rendered their account, although they were liable therefor, as they claimed, and although it appeared that the amount claimed by such counsel was not more than the services were fairly worth, the surrogate holding that by reason of the statute and of the limited jurisdiction of his court, he was only permitted to allow the executors on their final accounting such sums as they had actually paid, and he cited authorities which he claimed were to that effect, and which are to be found in the brief of the counsel for the respondents. The right to make allowances to executors for sums paid to counsel is provided for by chapter 686, Laws of 1893, p. 1707,

which amends section 2730 of the Code of Civ. Pro., and it is there provided that upon the settlement of executors' and administrators' accounts, allowances for such actual and necessary expenses as shall appear just and reasonable to the surrogate may be made by him.

We should have great hesitation in affirming the correctness of these views of the surrogate. We are not prepared to say that in no case can a surrogate make an allowance for the services of counsel to an executor of an estate for which such executor is liable, although he has not as yet actually paid the money. Of course, the fact of his liability would not be conclusive upon the surrogate on the question of making an allowance, nor upon the amount thereof as claimed by the attorney or admitted by the executor. It would seem to be a matter for the surrogate's determination as to the reasonableness and propriety of the claim, and that should be determined after an examination into the facts and circumstances of the charge to such an extent as might be necessary. We do not discuss the question further nor express a final opinion upon the matter, because the surrogate has found other facts which are entirely sufficient upon which to base his judgment, those facts being that in his judgment, while the executors were enjoined from acting as executors, there was no reason or propriety in their incurring expenses by way of professional advice in regard to the estate, and that so far as concerns their claim for payment to counsel of funds of the estate for services performed by counsel in resisting the application for the revocation of the executors' letters testamentary, their resistance was unreasonable and formed no ground for an allowance to pay any claim for professional services rendered them upon such resistance. These were matters upon which there was evidence which called upon the surrogate for the exercise of a fair and reasonable discretion in regard to such allowance, and he having exercised it and refused to grant such allowance, and his decree having been affirmed by the General Term, it is not a case for us to interfere. The appeal on the part of the executors to this court does not bring up the order made by the surrogate referring

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the issues upon the application to revoke their letters, nor does it bring up his order decreeing such revocation unless a bond were given and the costs by way of disbursements by the petitioner paid by the executors. There are several reasons why they were not brought up by the attempted appeal. A conclusive one is that the decree of the surrogate was in the alternative granting the petition and providing for the revocation, unless the executors paid the disbursements and filed a bond. This they did, and went on and performed their duties as executors. They could not thereafter appeal from the decree or order.

On the whole we think the judgment of the court below was right, and it must be affirmed.

All concur.

Judgment affirmed.

MARY A. PECKHAM et al., Respondents, v. THE DUTCHESS COUNTY RAILROAD COMPANY, Defendant; JAMES K. O. SHERWOOD, as Receiver, etc., Appellant.

After the rendition of a judgment herein requiring defendant forthwith to construct a farm crossing under its road on plaintiffs' lands, defendant leased its road to another railroad company for a long term. By the lease the lessee assumed all claims and suits arising out of, or in any way connected with, the operation of the road. Subsequently, in an action to foreclose a mortgage on the property and franchises of the lessee, a receiver was appointed, who took possession of the property, including the leased road, and continued the operation thereof. Plaintiffs thereupon served a copy of the judgment on the receiver with a demand that he proceed without delay to construct the crossing; this he neglected to do. On motion to compel the performance of the judgment by the receiver, *held*, it was no defense to the application that the receiver had no means with which to comply with the requirements of the judgment; that plaintiffs were entitled to have it executed, and if the bondholders were unwilling to furnish the means, possession of that part of the road passing over plaintiffs' land should be surrendered; and so, that an order was proper directing a compliance with the judgment or a surrender of the premises.

Reported below, 81 Hun, 899.

(Argued March 11, 1895; decided March 19, 1895.)

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APPEAL from order of the General Term of the Supreme Court in the second judicial department, made October 26, 1894, which affirmed an order of Special Term requiring James K. O. Sherwood, as receiver of the Philadelphia, Reading and New England Railroad Company, the lessee of defendant, to build a certain undercrossing for the convenience of plaintiffs' farm, in accordance with a judgment in the above-entitled action.

The nature of the action and the facts, so far as material, are stated in the opinion.

Milton A. Fowler for appellant. A receiver is not bound to perform covenants of the lessee, or pay the rent, except he continues to occupy under the lease, and thus becomes liable as for the use and occupation and not by virtue of the covenant to pay contained in the lease. (*Woodruff v. E. Ry. Co.*, 93 N. Y. 609, 623, 624.) A receiver cannot be held to the specific performance of a contract, and much less of a judgment. (*Express Co. v. Railroad Co.*, 99 U. S. 191-200.) The view taken by the General Term that this is a proceeding *in rem* and that the railroad company hold their title subject to an equitable lien in behalf of the claimants cannot be sustained either in law or logic. (Code Civ. Pro. § 3369.)

C. B. Herrick for respondent. The order made by the court below that the receiver should comply with the judgment in this action was not final and is not appealable to this court. (*Brinkley v. Brinkley*, 47 N. Y. 40; *Clark v. Binger*, 75 id. 344.) This order was within the discretion of the court below and is not appealable to this court. The discretion was properly exercised. (Code Civ. Pro. § 1241; 2 Story's Eq. Juris. § 744; 1 Van Santvoord's Eq. Pr. 626, 647; *De Lancy v. Piepgras*, 141 N. Y. 88, 96; *B. S. & C. Co. v. D., L. & W. R. R. Co.*, 130 id. 152; *Hale v. Frost*, 99 U. S. 389; *Vincent v. Parker*, 7 Paige, 65; *Woodruff v. E. R. Co.*, 93 N. Y. 609; *Pitt v. Davison*, 37 id. 235; *In re Le Blanc*, 14 Hun, 8; 75 N. Y. 398; *Iddings v. Bruin*, 4

Sandf. Ch. 417; *People ex rel. v. S. L. Ins. Co.*, 71 N. Y. 222; *Mills v. Davis*, 53 id. 349; *Lawrence v. Farley*, 73 id. 187.)

HAIGHT, J. This action was brought to compel the defendant to provide a farm crossing under the line of its railroad on the lands of the plaintiffs, and such proceedings were had therein that judgment in such action was rendered in favor of the plaintiffs on the 26th day of February, 1892, in which it was adjudged that such crossing be forthwith constructed. An appeal was thereupon taken from such judgment to the General Term of the Supreme Court, second department, in which court the judgment was affirmed on the 28th day of July, 1892, from which an appeal was then taken to this court in which that judgment was affirmed. After the entry of the judgment and the affirmance thereof by the General Term, and on the first day of August, 1892, the defendant leased its railroad and property of every description to the Philadelphia, Reading and New England Railroad Company, for the term of three hundred years. By the terms of the lease it was provided that the lessee shall assume and indemnify the defendant against all claims and suits arising out of or in any way connected with the use and operation of the demised premises during the continuance of the lease. Thereupon the Philadelphia, Reading and New England Railroad Co. entered into the possession of the defendant's railroad and property and commenced the operation thereof. On or about the 19th day of August, 1893, an action was commenced in the Supreme Court of Dutchess county by the Guarantee Trust and Safe Deposit Company, as trustee, against the Philadelphia, Reading and New England Railroad Company for the foreclosure of a mortgage upon the property and franchises of that company, and such proceedings were had therein that James K. O. Sherwood was appointed receiver of the rents and profits of the Philadelphia, Reading and New England Railroad Co., and as such he entered into possession of the defendant's railroad and property and continued the operation thereof as such receiver. The respond-

ents thereupon served copies of the judgments entered in their favor upon him, with a demand that he proceed without delay to carry into effect the requirements of such judgments, and construct the crossing as therein provided. He having neglected to perform the requirements of such judgments, a motion was noticed at Special Term in which the defendant and the receiver were required to show cause why an order should not be made putting the plaintiffs into possession of the lands formerly owned by them and taken by the defendant for its railroad, and over which the railroad had been constructed; and enjoining the defendant corporation and each and every of its officers, agents and servants, and the receiver, from in any manner making use of or running cars, engines or trains upon or over that portion of the lands of the defendant's railroad constructed upon the lands of the plaintiffs, until the requirements of the said judgments shall have been complied with, or for such other or further relief or order in respect thereto as to the court may seem just. Upon the hearing of such motion the Special Term ordered that the said receiver "do proceed forthwith to comply with all the requirements of the said judgments, and to make a crossing for the said plaintiffs under the line of said railroad in the manner therein directed." This order having been affirmed in the General Term, is now brought here for review.

In the affidavits read in opposition to the motion, it is said that the Philadelphia, Reading and New England Railroad Company "has no means, nor has it at any time since the entry of the judgment based upon the decision of the Court of Appeals had any means with which to comply with such judgment by building the crossing as aforesaid. Nor has it had any such means to furnish to the said receiver with which he could build the same." It is contended on behalf of the appellant that he is simply a receiver of the rents and profits in aid of the bondholders in the foreclosure action, and that he has no power to expend a dollar, except as ordered in that action; that the Guarantee Trust and Safe Deposit Company, representing the bondholders in that action, had no notice of

the proceedings in this action, or an opportunity to be heard herein.

We recognize the force of this contention, and that the receiver may not have the money at his disposal, or the power to comply with the order as made, and yet we think the plaintiffs are entitled to relief. The Philadelphia, Reading and New England Railroad Co. has obtained the possession of the defendant's road. Such possession has been passed over to the receiver, who is operating the same for the benefit of the trustee of the bondholders. The plaintiffs have the right to have their judgments executed, and if the bondholders are unwilling to furnish the means with which to execute the judgments, they should surrender up possession of the road which is now being operated in their interest by their receiver.

Full justice may be done to the parties by a modification of the order. The order appealed from should be modified by adding thereto, after the words "therein directed," the following: Or, in default thereof, after the expiration of six weeks, or such other time as the Supreme Court at Special Term may allow, the receiver surrender to the plaintiffs the possession of the premises described in such judgment, formerly owned by them, over which the defendant's railroad has been constructed; and that the receiver and the said defendant corporation, and each of them, their officers, agents and servants, be thereafter restrained from in any manner making use thereof, until all of the requirements of the said judgments shall have been complied with, and as so modified affirmed, without costs of this appeal to either party.

All concur.

Ordered accordingly.

HILTON BRIDGE CONSTRUCTION COMPANY, Appellant, v. THE
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COM-
PANY et al., Respondents.

LOUIS V. BOOREAM et al., Intervening.

Where, in an action by a sub-contractor to foreclose a mechanic's lien, it appears that plaintiff's cause of action depends upon payments made by the owner of the premises to the contractor before they were due by the terms of the contract, in case the contractor is not made a party an order is proper bringing him in.

In such an action it appeared that the contractor, a corporation, was originally made a party defendant. After service of the summons and complaint on the owners, but before service on the company, it assigned all moneys which should be found due and owing under the contract, as collateral security for an indebtedness; having become insolvent its property went into the hands of a receiver appointed by the court. The order making the appointment contained the usual injunction order enjoining all persons from commencing any action against the corporation. Thereupon plaintiff amended the summons and complaint by striking out the name of the corporation as defendant. The owners in their answers set up the assignment, the appointment of the receiver and alleged that they were proper and necessary parties. *Held*, that an order was properly granted bringing in said parties, so that the rights of all might be determined, and this, notwithstanding the fact that the owners admitted the overpayment and the amount thereof, as such admission would not bind the assignee or the receiver.

The contract was for the construction of a line of railroad. The contractor engaged to obtain the necessary rights of way; it employed counsel who performed this work, who had in their possession contracts, deeds and other papers upon which they claimed a lien for their professional services. These counsel, on motion of the owners, were brought in as defendants. *Held*, that said counsel had no lien or claim upon the fund in question, and the bringing them in was not a matter of discretion, but was legal error.

(Argued March 11, 1895; decided March 19, 1895.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made February 12, 1895, which affirmed an order of Special Term directing plaintiff, by supplemental summons and complaint, to bring in other parties defendant.

The nature of the action and the facts, so far as material, are stated in the opinion.

Edward Winslow Paige for appellant. No judgment of any sort can be rendered in this action in favor of the plaintiff against any of the parties whom the order brings in. (*Post v. Campbell*, 83 N. Y. 279; Laws of 1885, chap. 342, § 8; *Whitney v. McKinney*, 7 Johns. Ch. 147.) No one need be made a party against whom, if brought to a hearing, the plaintiff can have no decree. (3 P. Wms. 311; *Whitney v. McKinney*, 7 Johns. Ch. 144, 146; *Fenton v. Hughes*, 7 Ves. 287; Story's Eq. Pl. § 231; Gilb. Eq. 54, 55; 1 Harrison's Ch. Pr. [Lond. ed. 1808] 37; [Phila. ed. 1807] 76; Edwards on Parties [ed. 1832], 14; Barb. Parties [ed. 1884], 482, 485; *Le Texier v. Anspach*, 15 Ves. 159, 164; *Whitworth v. Davis*, 1 V. & B. 545, 550; *Turner v. Robinson*, 1 Sim. & Stu. 41; *Van Reemsdyk v. Kane*, 1 Gal. 371, 383, 630; *West v. Randall*, 2 Mass. 181, 192, 197.) The Code has not made any change by way of adding to those who were necessary or proper parties in the late Court of Chancery. (Code Civ. Pro. §§ 447, 452; *Chapman v. Forbes*, 123 N. Y. 532; *Post v. Campbell*, 83 id. 279; *Whitney v. McKinney*, 7 Johns. Ch. 146.) The order is appealable. (*Chapman v. Forbes*, 123 N. Y. 532.)

Thomas Sprutt for respondent. A determination in this action will not be binding upon the Moffett, Hodgkins & Clarke Company, its assignee, Marshall, and its receivers, Messrs. Booream and O'Brien, without making them parties. (Code Civ. Pro. § 452; Laws of 1885, chap. 342; *Osterhoudt v. Bd. Suprs.*, 95 N. Y. 242.) It would not be just or legal to take any sum which might be determined on a trial of this action to be due to the Moffett, Hodgkins & Clarke Company and pay it over to the plaintiff without giving the owner of the fund an opportunity to be heard. (*Sullivan v. Decker*, 1 E. D. Smith, 699; Laws of 1851, chap. 513; Laws of 1885, chap. 343; *Thomas v. Sahagun*, 10 N. Y. Supp. 874; *Williams v.*

Verein, Id. 368.) The appeal from the decision of the General Term in this case should be dismissed. (Code Civ. Pro. § 190; *Spears v. Mayor*, 72 N. Y. 442; *I. G. L. Co. v. Treman*, 93 id. 660.)

Conger & Orvis for respondents (in person). An attorney has a general or retaining lien for a balance due him in his professional employment upon all papers and documents which come to him by reason of his professional character. (*St. John v. Defendorf*, 12 Wend. 261; *Walker v. Sargent*, 14 Vt. 247; *Ward v. Craig*, 87 N. Y. 521, 550; *Lorillard v. Barnard*, 42 Hun, 545; 1 Am. & Eng. Ency. of Law, 969; 52 N. Y. 489.) A deed, to be effectual, must be delivered, and, although its appearance upon the record may amount to *prima facie* evidence of delivery, that evidence may be rebutted, even where the recording is apparently regular. (*Cusack v. Tweedy*, 56 Hun, 516; *Fisher v. Hall*, 41 N. Y. 416; *Bryant v. Bryant*, 42 id. 11.) A complete determination of the controversy cannot be had without the presence of Gerrit S. Conger and Arthur W. Orvis as defendants, and the court should, as it has done, direct them to be brought in as parties to this action. (Code Civ. Pro. § 452; Laws of 1885, chap. 342; *Sullivan v. Decker*, 1 E. D. Smith, 699; *Thomas v. Sahagan*, 10 N. Y. Supp. 874.)

PECKHAM, J. This is an equitable action to foreclose a mechanic's lien brought by the plaintiff, the Hilton Bridge Construction Company, against the Gouverneur and Oswegatchie Railroad Company and the New York Central and Hudson River Railroad Company and Benjamin N. Sherman and Ike Kinne, the two latter being subsequent lienors. The Central Hudson made a motion at Special Term to have the receivers of the Moffett, Hodgkins and Clarke Company and Mr. Louis Marshall, as assignee of the same company, and also Messrs. Conger and Orvis, attorneys of the same company, made parties defendant. The motion was granted at the Special Term and affirmed at the General Term, and from the

order of affirmance the plaintiff appeals here. From the papers it appears that the plaintiff brings its action against the two railroad companies to foreclose a mechanic's lien for bridges furnished in the construction of the Oswegatchie railroad under the following circumstances: The Oswegatchie Railroad Company was incorporated for the purpose of building and using a railroad between certain points in the county of St. Lawrence and it made a contract with the Central Hudson Company by which the latter company contracted to build the railroad and then to lease the right to use the same as a railroad during the corporate existence of the company. The Central Hudson Company then entered into a contract with the Moffett Company to build the road, by which the latter contracted, first, to acquire all the right of way for the railroad; second, to build the railroad and furnish all the materials except the rails, and, third, to assign to the order of the Central Hudson Company all the capital stock, etc., of certain railroad companies named in the contract. The Central Hudson Company agreed to furnish all the rails and to pay the Moffett Company the sum of \$241,000 in cash in four payments of some \$38,000 each, and the balance, some \$86,000, when the Moffett Company had fully performed its contract in all its parts and when it was shown that no mechanics' or other liens for work or labor done or materials furnished under the contract had been filed. The plaintiff was employed by the Moffett Company to build the necessary bridges, and they were completed by the plaintiff on the 15th of June, 1893. On the 2d of June, 1893, the plaintiff alleges that none of the three things which the Moffett Company had agreed to do had been completed, nevertheless the Central Hudson Company had made to it the four payments of \$38,000 each and twenty-six thousand odd dollars on account of the last payment of \$86,000, and the plaintiff alleges that this last payment of \$26,000 was made in advance of the terms of the contract, as no portion of the \$86,000 last to be paid was due until entire performance of the contract by the Moffett Company and until it was known that no

mechanic's lien was or would be filed. As the Moffett Company had thus failed to fulfill the first contract, the Central Hudson and the Moffett Company made another and second one on the second of June, 1893, under which certain payments were to be made and by which the Central Hudson was to advance and pay to the Moffett Company \$20,000 on account of the last payment mentioned in the first contract as soon as it was satisfied that the right of way had been procured. The Central Hudson thereupon took possession of the railroad, completed it and began running it on the 1st of August, 1893, and under the second contract it advanced \$15,000 instead of the \$20,000 provided for, although the right of way had not been at that time all procured, and to clear up what was left undone would cost according to plaintiff's papers over \$1,500, and according to the papers used on this motion over \$4,700. The plaintiff alleges that this last payment of \$15,000 was also made in advance of the terms of both contracts, and that no part of either payment was due when made.

The success of the plaintiff, therefore, depends upon the existence of the fact that payments were made by the Central Hudson Company to the Moffett Company in advance of the terms of the contracts as claimed. The Central Hudson Company admits that it has overpaid the Moffett Company, and that nothing is due to that company under either of its contracts, and that it took possession of the Oswegatchie railroad and completed it as stated at its own expense and that the Moffett Company is really in its debt. Unless, therefore, the plaintiff can establish this fact of payment of money before it was due under the terms of the contract by the railroad company to the Moffett Company, it cannot maintain this action. The plaintiff says that this fact is admitted by the parties to the action and such admission is all that is necessary to establish this claim.

Under the Lien Act of 1885 (Chap. 342) it has been held in this court that where the owner has made payments to his contractor, although without fraud or collusion, before they

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are due under the terms of the contract, such payments cannot be allowed to the owner. (*Post v. Campbell*, 83 N. Y. 279, 283.) The admission of the Central Hudson Company as to the fact of such payments while good as against itself in favor of the plaintiff, does not and cannot bind the Moffett Company, and this action, if it should proceed to judgment without the presence of the Moffett Company, would be no obstacle to the latter company in an action which it might bring against the Central Hudson Company to obtain payment for a balance it might claim under its contracts with that company. The judgment in this action would not bind the Moffett Company because it is not a party to it. The fund out of which the plaintiff seeks satisfaction of its lien arises by virtue of alleged payments made on these contracts before they were due, and the Moffett Company has an interest in that question. If the plaintiff is right as to its claim as to payments made by the Central Company before they were due to the Moffett Company under the terms of its contracts, the amounts of such payments cannot be allowed the Central Company and it is liable to pay the same to the plaintiff to the amount of its lien. It ought not to be subjected to the hazard of a controversy with the Moffett Company upon this same question and of making a payment to it based upon the fact that payments to the Moffett Company had not theretofore been made before they were due and that it still owed the Moffett Company upon these contracts. If sued separately the Central Co. runs the risk of paying twice. The two claims are inconsistent in fact, and if the Central Company is liable to pay the plaintiff on the ground claimed, it is not liable to pay the same to the Moffett Company. Ought not these two liabilities, arising out of one and the same transaction, to be heard and decided together in this equitable and statutory suit and the Central Company thus saved from possible complications. If not made a party here, of course the Moffett Company is not bound by any judgment that may be entered in this action; but has not the Central Company a right to ask the court to direct that the Moffett Company

shall be brought in as a party so that it may be bound by the adjudication in this case? Taking into consideration the fact that this action is of an equitable nature, brought (under a special statute which gives the right) to foreclose a lien upon a railroad company, the existence and amount of which lien is to be determined, not alone by the amount due the plaintiff from the Moffett Company, but also by the existence of the fact that payments were made by the Central Company to the Moffett Company before they were due, we think it cannot be said that it was improper to join the Moffett Company as a defendant in this action, not for the purpose of obtaining a judgment by the plaintiff against the Moffett Company (unless it desire it), but for the purpose of binding the Moffett Company by the determination in this action of those facts out of which the plaintiff's lien is to arise, and thus to save the Central Company from a possible second payment on a judgment in another action in regard to the same subject. The fact that a complete determination might be had of the question between the plaintiff and the Central Hudson Company on the allegations of the plaintiff admitted by that company is not an answer to the objection which the Central Hudson Company sets up, that unless the Moffett Company be made a party the adjudication herein will not bind that company, and that company, in a subsequent action brought against the Central Hudson Company to obtain payment of moneys it alleged to be due, might also obtain a judgment and secure a payment from the Central Hudson Company by reason of a different determination as to the actual facts arising out of this same transaction and subject-matter, which had been already determined the other way in this action without the presence of the Moffett Company.

In the case of *Chapman v. Forbes* (123 N. Y. 539) we held that in an action at law, pure and simple, a plaintiff could not be compelled to bring in other parties where the determination of the subject-matter involved in the action itself could be completely had between the original parties, and where the judgment in that action would form no obstacle to any claim

which a third party might thereafter make against the defendant in that action. In an action at law of that nature, and in regard to the circumstances of that particular case, we held that the sections of the Code (§§ 452 and 447) did not give to the defendant the right to have another party brought in as a party defendant where his presence was not necessary to a complete determination of their rights as between the two parties to the action.

This case arises under the Mechanics' Lien Law, and it is an action peculiar to itself and one in which we think it proper that the contractor should be brought in where the plaintiff's cause of action depends upon the payments made by the owner to the contractor before they were due under the terms of the contract. The existence of the fund upon which the plaintiff depends for its cause of action thus depends upon and arises out of the very subject-matter of the contracts and payments under them, and in such case we think it but fair that the litigation should be ended on that subject in one action. Hence, if the Moffett Company were in existence it would be proper and appropriate to cause it to be brought in as a defendant. As this cannot be done the receivers may be made parties as representatives of the company. It appears that when the plaintiff first commenced this action it made the Moffett Company a party defendant, and after the service of the summons and complaint on the railroad companies, but before service upon the Moffett Company had been made, the latter company became insolvent and went into the hands of receivers. A few days prior to that time the Moffett Company assigned to Mr. Louis Marshall all the amount which might be found due to it under the contracts which it had with the Central Hudson Company as collateral security for professional services performed by the assignee and for money loaned to that company. At the time of the appointment of the receivers the ordinary injunction order was issued by the court, enjoining all persons from commencing any suit against the company and providing for proving any claims against the company before the receivers. Thereupon the plaintiff

amended its summons and complaint by striking out the name of that company as a party defendant. The railroad companies put in their answers and set up the fact of the appointment of the receivers for the Moffett Co. and the assignment by the company to Mr. Marshall, and alleged that they were proper and necessary parties to the action, without whose presence a complete determination of the controversy could not be had. The same principle which permits the court to direct the bringing in of the receivers of the company would prevail, as it seems to me, in regard to Mr. Marshall. The company has assigned to him, as is alleged, all the moneys which might be found due and owing to that company from the defendant, the Central Hudson Company. An admission on the part of the Central Hudson Company and of the Moffett Company as to that amount would not bind Mr. Marshall. If that assignment be a valid and subsisting one, which I assume it to be, Mr. Marshall stands to that extent in the place of the company, and whether there is any amount due the company, and hence, due to him, depends upon the state of facts which I have already alluded to when speaking of the propriety of making the Moffett Company a party. I do not say that he is a necessary party, but I do think that he is a proper party under the circumstances, so that Mr. Marshall shall be bound by the determination in this action of those facts out of which may arise the liability of the Central Hudson Company to pay the Moffett Company any further moneys under either of these contracts above alluded to. Otherwise, as the assignee of the Moffett Company, Mr. Marshall might bring an action against the Central Hudson Company and make the same claim that his assignor had or might have done. Which of the two, the receivers or Mr. Marshall, may be entitled to any moneys under those contracts, or whether either is entitled to anything, is matter to be determined herein after a consideration of all the facts to be proved in the case.

The court, in addition to directing the above parties to be brought in, also directed that the attorneys for the Moffett Company should be made parties defendant. The facts are as

follows: As the Moffett Company had engaged in its contract with the Central Hudson Company to obtain the rights of way, among other things, for the purpose of building the Oswegatchie railroad, the Moffett Company retained Messrs. Conger and Orvis to attend to that part of the work, and they have under that retainer done a large amount of very valuable work for that company. They have procured the right of way to a very large extent and have in their possession contracts, title deeds and other papers relating to the business upon which they claim, and, so far as appears from the record, they have a lien for their professional services. They allege that there is still due them from the Moffett Company a sum of about \$2,000, and the Central Hudson Company claims that they are necessary and proper parties to be made defendants in this action, and the courts below have so held. We cannot see upon what ground the decision can be upheld. They have no lien or claim of any kind upon this fund in any event. Whatever amount may be found due, if any, from the Central Hudson to the Moffett Company, they have no title to or lien upon such amount. If we assume that the Moffett Company has not performed its contract with the Central Hudson and did not obtain the right of way and give to the Central Hudson all the necessary proofs and title deeds in regard to it, and that the Central Hudson Company will have to pay the attorneys in order to obtain the necessary muniments of their title, and may, therefore, deduct that amount from any sum which the Central Hudson Company might otherwise owe to the Moffett Company, there is still no reason for making the attorneys parties to this action. If the Central Hudson pay that sum to the attorneys, the latter have no further interest in the matter, and we may assume that what the Central Hudson pays to the attorneys, it may claim the right to deduct from any amount due on the contracts with the Moffett Company. With that question the plaintiff has nothing whatever to do, no interest in it, no right to be heard in regard to it, and its own right can be neither increased nor diminished by any determination in regard to that ques-

tion. Its rights depend upon the overpayment already made at the time when its lien was filed. If that fact cannot be established, this cause of action goes; if it can, this action is so far proved. In neither event have these attorneys any right to appear in the action; if made defendants, they would have no right to litigate the question of the amount (if any) due from the Central to the Moffett Company, because it would have no bearing upon any of their rights or claims against the Moffett Company. The amount due that company might be increased, but the attorneys would have no lien upon a dollar of it, and, if diminished, their rights would be totally unaffected. In no aspect of the case can we see any propriety in their being made parties. The decision of the court below directing them to be brought in was not matter of discretion and was legal error.

The order must, therefore, be modified by striking out the names of the attorneys in the directions given to bring in parties, and, as modified, the order should be affirmed, without costs to either party in this court.

All concur, except FINCH and O'BRIEN, JJ., not sitting.

Ordered accordingly.

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AGNES CAMERON, as Administratrix, etc., Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Where a railroad employee is injured through the negligent omission of duty on the part of a co-servant, although it appears that similar omissions by the latter had been habitual for some time prior to the injury, unless the master has actual notice of the omission, or unless the negligence is of such a character as to leave traces or evidences of it in the work itself which could be seen or discovered by reasonable examination, or unless the delinquencies were frequently displayed under the observation of some officer or foreman who represented the corporation and had power to discharge the negligent employee, the law will not imply notice to the company so as to charge it with the negligence under all circumstances simply from the lapse of a certain time since the co-employee began so to neglect his duties.

C., plaintiff's intestate, a brakeman in defendant's employ, was working behind the cars of a freight train standing on a side track. N., a fel-

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Statement of case.

low-brakeman, working on the same train, had opened the switch and left it unguarded, and in consequence a passing train ran over the switch upon the side track and came into collision with the freight cars, causing C.'s death. In an action to recover damages no negligence on the part of defendant in employing N. was claimed; he had been in its employ about a year. Defendant had promulgated rules for the guidance of its servants, which provided that "whoever opens a switch shall remain at it until it is closed or until he is relieved by some competent employee;" also, that every employee whose duties are prescribed by the rules must have a copy of them on hand and be conversant with every rule, and must report any infringement of them to the head of his department. N. was familiar with and had a copy of the rules; he, as a witness for plaintiff, testified that for about four months prior to the accident he had been accustomed to habitually violate said rule in regard to switches. It was not claimed that any officer of or person representing defendant had actual knowledge of these violations, and the officers having charge and power to employ and discharge help certified that they never heard of them and from inspection, observation and report they supposed N. was competent and faithful. *Held*, the evidence did not justify a finding that defendant was chargeable with negligence in failing to discover N.'s violation of said rule and in omitting to discharge him; that, under the circumstances, negligence could not be imputed to it simply because for four months it had failed to detect N.'s delinquencies; that it was more reasonable to suppose that C. had knowledge of them and he, having failed to report them, might be regarded as having voluntarily assumed the risks incident thereto.

Coppins v. N. Y. C. & H. R. R. Co. (122 N. Y. 557); *Whittaker v. D. & H. C. Co.* (126 id. 549); *Wall v. D., L. & W. R. R. Co.* (54 Hun, 454; *affd.*, 125 N. Y. 727), distinguished.

Cameron v. N. Y. C. & H. R. R. Co. (77 Hun, 519), reversed.

(Argued March 14, 1895; decided March 22, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 8, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This action was brought to recover damages for the death of plaintiff's intestate, alleged to have been caused through the negligence of defendant.

The facts, as far as material, are stated in the opinion.

F. L. Westbrook for appellant. The motion to non-suit and to dismiss the complaint should have been granted.

(Penal Code, §§ 195, 424; *Jaquinto v. R. R. Co.*, 49 Penn. St. 628; 2 Thom. on Neg. 1053; 3 Wood's Railway Law, § 392, 1505; *U. P. Ry. Co. v. Milliken*, 8 Kans. 655; *M. P. R. Co. v. Young*, Id. 660; *Davis v. R. R. Co.*, 20 Mich. 122; *Stafford v. R. R. Co.*, 114 Ill. 247; *M. C. R. R. Co. v. Dolan*, 32 Mich. 510-513; *Wright v. R. R. Co.*, 25 N. Y. 566; *E. & W. R. R. Co. v. Smith*, 125 Penn. St. 259; *Meech v. R. R. Co.*, 150 id. 610; *Rose v. R. R. Co.*, 58 N. Y. 222; *Lincoln v. French*, 105 U. S. 617; *McLosier v. R. R. Co.*, 21 Hun, 506; S. & R. on Neg. § 103; *Bradley v. R. R. Co.*, 62 N. Y. 102; *Malone v. Hathaway*, 64 id. 9, 10; *Lewis v. Seifert*, 116 Penn. St. 628, 649.) The question to Norton: "Did the conductor in charge of your crew and other employees know of the practice that you had been to in the way of opening switches?" was objected to on the ground that notice to a fellow-employee is not notice to the company. The objection was overruled and defendant excepted. This is error for which the judgment should be reversed. (*Slater v. Jewett*, 85 N. Y. 69; *McDonald v. R. R. Co.*, 63 Hun, 237, 591; 138 N. Y. 663; *Brown v. R. R. Co.*, 72 Cal. 523; *Miller v. R. R. Co.*, 20 Oreg. 285, 293; *Thayer v. R. R. Co.*, 18 Ind. 226; *Smith v. Railway Co.*, 46 Mich. 263; *Cassidy v. R. R. Co.*, 76 Maine, 488; *Johnson v. T. B. Co.*, 135 Mass. 710; *McGinty v. R. Co.*, 155 id. 187; *Malone v. Hathaway*, 64 N. Y. 9, 11, 12; *Laning v. R. R. Co.*, 49 id. 534; *O. & M. R. Co. v. Collarn*, 73 Ind. 272; *Reiser v. P. C. Co.*, 152 Penn. St. 38, 41; *Sherman v. R. R. Co.*, 106 N. Y. 547; *Duryea v. Vosburgh*, 121 id. 68; *Brague v. Lord*, 67 id. 499; *Patten v. Ins. Co.*, 133 id. 450.) But were it conceded that Norton was incompetent and defendant had notice of it, to recover against defendant plaintiff had to go further, allege and prove that Allen Cameron was in no wise at fault or negligent; that his neglect, his want of care, did not contribute to his being injured. (*L. S. R. R. Co. v. Stupack*, 108 Ind. 1-6; *Dow v. R. R. Co.*, 8 Kans. 646; *McMillan v. R. R. Co.*, 20 Barb. 449-454; *Haskin v. R. R. Co.*, 65 id. 129-132; *Burke v. With-*

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erbee, 98 N. Y. 567; *Shields v. R. R. Co.*, 133 id. 559; *P. & R. R. Co. v. Hughes*, 119 Penn. St. 313; *U. S. R. S. Co. v. Wilder*, 116 Ill. 100; *Murphy v. Crossan*, 98 Penn. St. 495; *Borden v. R. R. Co.*, 131 N. Y. 671; *Wiwiorowski v. R. R. Co.*, 124 id. 425; *Bond v. Smith*, 113 id. 385.) When illegal evidence properly excepted to has been received during a trial, it must be shown that the verdict was not affected by it, or the judgment must be reversed. If the evidence may have affected the verdict, the error cannot be disregarded. (*Erben v. Lorillard*, 19 N. Y. 302; *Furst v. R. R. Co.*, 72 id. 547; *Wersebe v. R. R. Co.*, 49 N. Y. S. R. 619; *Lindsay v. People*, 63 N. Y. 153, 154; *People v. Smith*, 104 id. 506; Baylies' Tr. Pr. 500, 501; *H. R. R. Co. v. Decker*, 82 Penn. St. 124; *Frace v. R. R. Co.*, 143 N. Y. 182.)

John M. Gardner for respondent. Defendant was negligent for retaining in its service brakeman Norton, whose constant habit of violating rule 117, in leaving switches open and unprotected, not only made him incompetent, but resulted in the death of the deceased. (*Coppins v. N. Y. C. R. R. Co.*, 122 N. Y. 364; *Whitaker v. D. & H. C. Co.*, 126 id. 549; *Wall v. D., L. & W. R. R. Co.*, 125 id. 727.) The intestate was not guilty of contributory negligence. (*Johnson v. R. R. Co.*, 20 N. Y. 65; S. & R. on Neg. § 109.)

O'BRIEN, J. On the 2d of May, 1891, Allen Cameron, the plaintiff's son and intestate, about twenty years of age, received injuries while in the defendant's service as a brakeman on the West Shore branch of its road, at Marlboro station, which subsequently resulted in his death.

There is no dispute in regard to the facts which describe the accident. A train going north, at a high rate of speed, ran into an open cross-over switch upon the south-bound track and came in collision with some standing freight cars, behind which deceased was at work, causing them to be suddenly and violently moved back over him, resulting in the injury which subsequently produced his death. The accident would

not have occurred but for the fact that the switch had been left open and unguarded. That this situation was solely due to the negligence of a fellow-brakeman, one Norton, is also undisputed. The deceased and Norton were, on the day of the accident, working upon the same train, which was a freight train going south, and which had stopped at the station to take on some other cars. It was not claimed that the defendant was guilty of any negligence in employing Norton. He had been in the service about a year, as had also the deceased.

The plaintiff, however, called Norton as a witness, and he testified that for about four months prior to the accident he was accustomed to habitually violate the defendant's rules in leaving switches open and unguarded. It was not claimed that any officer or person representing the defendant had any actual knowledge of this conduct. On the contrary, the division superintendent, the roadmaster, yardmaster and dispatcher of trains, all of whom had power to employ and discharge help, testified that they never heard of such conduct on the part of Norton, and that from inspection, observation and report they supposed he was a competent and faithful man, and never heard of his violation of any rules.

The only question submitted to the jury was whether the defendant was not chargeable with negligence in failing to discover Norton's habitual neglect and violation of the rules and in omitting to discharge him. It is also conceded that the defendant had enacted and promulgated proper rules and regulations for the government of its servants and employees. It will be sufficient to refer to two of these rules. Rule four provides as follows: "Every employee of the company whose duties in any way are prescribed by these rules must always have a copy of them on hand, and must be conversant with every rule. He must render all the assistance in his power in the carrying of them out, and must report any infringement of them to the head of his department." Rule 117 provides that "whoever opens a switch shall remain at it until it is closed, or until he is relieved by some competent employee." It was Norton's violation of this last rule that caused the acci-

dent. He opened the switch and left it open and unguarded, and the north-bound train entered upon it, thus producing the collision which resulted in the death of his fellow-brakeman. The omission of duty did not proceed from ignorance or want of instruction since Norton was familiar with the rules and had a copy of them in his possession. There is no arbitrary rule of law that charges the master with constructive notice of the negligent omissions of duty on the part of a co-servant, after the lapse of a certain time, under all circumstances. The doctrine of constructive notice is founded upon reasonable and just considerations, and the mere lapse of time is not always the test of negligence on the part of the master. If a defect exists in the appliances furnished the servant for doing his work of such a character and for such a length of time as to enable the master to discover and remedy it by reasonable vigilance, inspection or examination, then the law will imply notice since he ought to know what can thus be ascertained. The same rule will apply where the place furnished to the servant to do his work becomes defective, dangerous or unsafe by use or otherwise. So when the negligence of a co-servant in performing his work is of such a character as to leave traces or evidence of it in the work itself which can be seen or discovered by reasonable examination, the master might be chargeable after it had continued for such a length of time as to render it reasonable to assume that he either must have known of the omission of duty, or could have known of it by the exercise of reasonable care, or where the incompetency of the servant is frequently displayed under the eye and observation of some officer or foreman who represents the corporation or had the power to discharge him.

But how was the master in this case to know that Norton habitually violated the rules for his own protection and that of his co-servants? His work was performed on freight trains running over a long line of railroad, with little, if any, opportunity for any officer or representative of the company to watch or observe him at any one point. He had sufficient ability and intelligence to do his work, and his omissions of

duty were purely willful or thoughtless. It would be manifestly unreasonable and unjust under such circumstances to impute negligence to this defendant for the sole reason that during four months it failed to detect his delinquencies. The defendant had given him by its rules plain and simple instructions to govern his conduct with respect to the switches, and there was no reason to suspect that they would be disregarded, since it was quite as convenient for him to obey as to violate them. Moreover, it had in these same rules invited and requested all of his co-servants to make prompt report to the company of any neglect or disobedience of the rules on his part, and no complaint had been made. It was reasonable to assume that his co-employees, whose lives might be endangered by his neglect, would observe and report his omissions of duty, if any, and if they failed to observe any, how can it be said that the defendant itself was in fault for not discovering what his co-servants themselves had not discovered? The negligent acts of Norton took place while he was working on the same train and in a like capacity with the deceased. It is more reasonable to suppose that they were done in his presence, or under his observation, than to imply knowledge on the part of the defendant, and if it can be said that the deceased knew of these omissions of duty on the part of his fellow-brakeman, and failed to report them, he might be regarded as voluntarily assuming the risks and dangers incident to his association in a common work with a careless or incompetent co-servant. There is a manifest inconsistency in assuming that the officers or representatives of the defendant knew, or could have known, of Norton's violation of the rules, and at the same time that the deceased did not. On the evidence in the case it is true that the defendant's servant was unfaithful, and that his want of care resulted in the death of the plaintiff's intestate. But the defendant cannot be made liable for his negligent act, unless it was at fault in selecting him for the work, which is not claimed, or in failing to adopt such means as ordinary prudence and care would dictate to secure his fidelity, and we are unable to perceive what more it could

have done, unless it employed other men to watch his conduct, and that would be plainly an unreasonable requirement.

The learned court below has upheld the verdict in this case upon the authority of three recent cases in this court, which it was supposed sustained the principle upon which the recovery proceeded. (*Coppins v. N. Y. C. & H. R. R. Co.*, 122 N. Y. 557; *Whittaker v. D. & H. C. Co.*, 126 id. 549; *Wall v. D., L. & W. R. R.*, 54 Hun, 454; *affd.*, 125 N. Y. 727.)

There is, we think, a clear distinction between these cases and the one at bar. In all of them there was evidence from which the jury could have found actual notice or knowledge of the incompetency of the co-servant on the part of the master. This case rests solely upon the doctrine of implied or constructive notice. The jury was permitted to find that the defendant was guilty of negligence in failing in some way to ascertain the fact that Norton had habitually violated the rules. In view of the conceded fact that there was no fault in his original employment, and that the defendant had adopted and promulgated suitable rules and had given proper directions for the regulation of his conduct, which it had, under the circumstances, and so far as appears, no reason to suppose would be or were disregarded, the judgment has no reasonable or just ground upon which to rest. The habitual and intentional disregard by Norton of the rules was, under the circumstances, entirely consistent with the exercise by the master of reasonable care; and in fixing responsibility for the results of the accident, that must be the only measure of duty. To hold that it was bound in any event, after the lapse of a reasonable time, to know the delinquencies or habitual mistakes of all its servants or employees, would be, under the circumstances, to establish a rule quite unreasonable in itself, and exceedingly difficult, if not impossible, under all circumstances, of any fair or just application.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur (BARTLETT, J., in result).

Judgment reversed.

LEWIS W. HUDSON, as Administrator, etc., Respondent, *v.*
THE ROME, WATERTOWN AND OGDENSBURG RAILROAD COM-
PANY, Appellant.

While the determination of the General Term upon all questions as to the weight of evidence is final, and not reviewable here, where there is no conflict in the evidence, or that which appears to be in conflict is but a mere scintilla, or is met by well-known and scientific facts about which there is no conflict, this court may review the decision, if contrary to the evidence, and reverse it.

In an action to recover damages for alleged negligence causing the death of H., plaintiff's intestate, it appeared that he was a fireman on one of defendant's engines. When the train was stopping at a station to take water for the engine the engineer left it in the charge of H. and went into the depot; shortly thereafter the crown sheet of the engine collapsed and the escaping steam inflicted injuries upon H. causing his death. An examination of the engine showed that the crown sheet had been scorched, and this caused the collapse. Plaintiff claimed that the scorching took place at some previous time, and that defendant was negligent in sending the engine out in an imperfect condition. The engineer testified in substance that on arrival at the station there was about six inches of water over the crown sheet. This was determined by trying the gauge cock. Experts, however, testified that the sheet could not scorch or become red hot while covered with water, and that, in their opinion, from its appearance after the accident, which was described and as to which there was no question, it must have been red hot at the time it collapsed, and there was no evidence that the scorching was done at any other time. *Held*, the evidence did not justify a finding that the scorching took place at a time prior to the starting out of the engine, and so did not justify a verdict for plaintiff.

Hudson v. R., W. & O. R. R. Co. (73 Hun, 467), reversed.

(Argued March 12, 1895; decided March 22, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made November 21, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

D. G. Griffin for appellant. The court erred in refusing to grant motion for a non-suit. (136 N. Y. 77; *Byrnes v. N.*

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164	313
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Y., L. E. & W. R. R. Co., 113 id. 251; *Ford v. L. S. & M. S. R. R. Co.*, 117 id. 639; *Filbert v. D. & H. C. Co.*, 121 id. 212; *La Croy v. N. Y., L. E. & W. R. R. Co.*, 132 id. 572.)

John N. Carlisle for respondent. The questions of fact submitted to the jury having been found by them on conflicting evidence, this court will not disturb them. (*Berminghoff v. Agricultural Ins. Co.*, 93 N. Y. 495, 500; Code Civ. Pro. § 1337.) Defendant failed to perform its duty to use reasonable care in the inspection of the engine in question before it turned the same over to plaintiff's intestate. (*Hastings v. B. L. Ins. Co.*, 138 N. Y. 479; *Bailey v. R., W. & O. R. R. Co.*, 139 id. 302; *S. S. U. Bank v. Sloan*, 135 id. 383; *Hart v. Hudson R. R. Co.*, 80 id. 622.) The master owes a duty to its employees to furnish them with safe machinery, tools and appliances adapted to the work to be done, and to keep them in repair. (*Bailey v. R., W. & O. R. R. Co.*, 139 N. Y. 362; *Ellis v. N. Y., L. E. & W. R. R. Co.*, 95 id. 546; *Lansing v. N. Y. C. & H. R. R. Co.*, 49 id. 521; *Fuller v. Jewett*, 80 id. 46.) If, by the exercise of proper care and inspection, the defendant could have discovered the defect which led to the injury, and failed so to do, it is liable. A master is liable to his servant for an injury caused by defective machinery, the defects in which could have been discovered by the exercise of reasonable care. (*Bailey v. R., W. & O. R. R. Co.*, 139 N. Y. 302; *N. P. R. R. Co. v. Herbert*, 116 U. S. 642; *Ballard v. H. M. Co.*, 58 Hun, 188-192; *Stevenson v. Jewett*, 16 id. 210; *H. v. T. & P. R. R. Co.*, 110 U. S. 213; *Pantzar v. T. F. I. M. Co.*, 99 N. Y. 368; *Fuller v. Jewett*, 80 id. 46; *Ford v. R. R. Co.*, 110 Mass. 241; *Durkin v. Sharp*, 88 N. Y. 225; *Benzing v. Steinway*, 101 id. 552; *McGovern v. C. V. R. R. Co.*, 123 id. 280-288.) Where a servant is injured by the negligent performance of an act or duty which the master as such is required to perform, the latter is liable although the act was that of another servant, to whom the performance of the act or duty was intrusted, and this without regard to the

rank or title of the person guilty of the negligence. A master is not relieved from liability in such case by the fact that he has promulgated rules and regulations for the proper performance of the act or duty by his agent, which were disregarded by the latter. (*Hankins v. N. Y., L. E. & W. R. R. Co.*, 142 N. Y. 416; *Bailey v. R., W. & O. R. R. Co.*, 139 id. 302; *Durkin v. Sharp*, 88 id. 225; *Pantzar v. T. F. I. M. Co.*, 91 id. 372; *Benzing v. Steinway*, 101 id. 552; *McGovern v. C. V. R. R. Co.*, 123 id. 288; *Lansing v. N. Y. C. & H. R. R. R. Co.*, 49 id. 521-532; *Fuller v. Jewett*, 80 id. 46; *Filke v. B. & A. R. R. Co.*, 53 id. 549.) While a servant assumes the ordinary risks of his employment, and, as a general rule, such extraordinary risks as he may knowingly and voluntarily see fit to encounter, he does not stand upon the same footing as the master, as respects the matter of care in inspecting and investigating the risks to which he may be exposed. (*Krang v. L. I. R. R. Co.*, 123 N. Y. 1-4; 14 Am. & Eng. Ency. of Law, 854; *Mehan v. S. B. & N. Y. R. Co.*, 73 N. Y. 585.) The doctrine that a servant cannot recover on account of an accident caused by a defect of which he had knowledge, and the risk of which he voluntarily assumed, does not apply to cases where the defect is caused by the employer's neglect to make proper and reasonable repairs. (*Kaare v. T. S. & I. Co.*, 46 N. Y. S. R. 451; *Pantzar v. T. F. I. M. Co.*, 99 N. Y. 376; *McGovern v. C. V. R. R. Co.*, 123 id. 287; *Ellis v. N. Y., L. E. & W. R. R. Co.*, 95 id. 552; *Cone v. D., L. & W. R. R. Co.*, 81 id. 206.)

HAIGHT, J. This action was brought to recover damages for causing the death of Harry L. Hudson, the plaintiff's intestate. Hudson was in the employ of the defendant engaged as a fireman on engine No. 103. George H. Grower was the engineer in charge. On the 8th day of October, 1890, at 1.45 p. m. they took the engine in question from the yard in Watertown and started out with a freight train for Oswego. They took water at Watertown, Pierrepont Manor

and Richland. On arriving at Mexico they stopped at the water column to again take water. The engineer then left the engine in charge of Hudson and went into the depot. A few minutes thereafter the crown sheet of the engine collapsed, allowing the steam to escape into the fire box and blow out through the door thereof, inflicting injuries upon Hudson from which he shortly thereafter died. An examination of the engine, after the accident, disclosed the fact that the crown sheet had been scorched throughout its entire length, covering an area of thirty-two inches at the front of the fire box and gradually diminishing until, at the back end the scorched area was sixteen inches in width. The scorched part was white, of a bluish cast and perfectly clean, having no soot, or other substance attached to it. The crown sheet had been convex, but had reversed its arch and pressed down into the fire box a distance of seventeen and a half inches, so as to become concave. Prior to the accident the crown sheet had been supported by numerous stay bolts, screwed into the plate and riveted on the fire box side. These bolts had drawn out, leaving holes in the sheet, through which the steam had escaped into the fire box. The sheet itself, after the collapse, was extended longitudinally from ten to fourteen inches, and the holes caused by the withdrawing of the stay bolts had become elongated. The engine was nearly new; of first-class construction, and in other respects was in perfect condition.

It is conceded by all parties that the accident occurred in consequence of the scorching of the crown plate. It is contended on behalf of the plaintiff that the scorching had taken place at some previous time, and that the defendant was negligent in sending the engine out upon the road while it was in that condition. On behalf of the defendant it is claimed that the scorching took place at the time of or just preceding the accident.

The question is thus presented as to when and where the scorching took place. The only evidence presented on behalf of the plaintiff bearing upon this question is that of the

engineer in charge and the hostler in the yard at Watertown. The engineer testified that he kept the crown sheet covered with water throughout the entire trip, and that on arriving at Mexico it still had two full gauges, which would be about six inches of water over the sheet. The hostler testified that he kept the engine watered whilst it stood in the yard at Watertown under his charge. From this evidence the jury was asked to find as a fact that the crown sheet had been scorched on some occasion prior to the accident. Opposed to this are the facts disclosed by the examination of the engine after the collapse and the testimony of the experts, from which it appears that the crown sheet was constructed of steel; that scorching tended to make it more dense and less ductile, so that it would be more liable to crack and less liable to expand; that it could not scorch or become red hot whilst covered with water; and that in their judgment the crown sheet must have been red hot at the time it collapsed.

The plaintiff, in order to recover, was bound to establish negligence on the part of the defendant by a preponderance of evidence. All questions as to the weight of evidence are final in the General Term, and this court has no power to review the determination of that court with reference thereto. But where the evidence which appears to be in conflict is nothing more than a mere *scintilla*, or where it is met by well-known and recognized scientific facts, about which there is no conflict, this court will still exercise jurisdiction to review and reverse if justice requires. (*People ex rel. Coyle v. Martin*, 142 N. Y. 352; *Hemmens v. Nelson*, 138 id. 517-529; *Linkauf v. Lombard*, 137 id. 417.) The judgment of the experts is based upon well-known and recognized scientific facts which to our minds is controlling. The crown sheet was found to have been scorched. It was white with a bluish cast and perfectly clean, tending to show that the scorching was recent; had it been worked after the scorching evidence of soot and discoloration would be expected. The stay bolts had drawn out, the arch inverted, the sheet extended and the holes elongated without sign of a crack or other flaw. Could this have

occurred with this steel sheet cool and under water ; could it be stretched ten to fourteen inches and inverted in that condition ? The experts say no. And their judgment accords with our learning and experience.

There is no evidence that the scorching was done on any other occasion, aside from the inference that might be possibly drawn from the testimony of the engineer already alluded to. He could determine the amount of water over the crown sheet by trying the gauge cocks. But in trying these he may have mistaken steam for water. However that may be, in the absence of further evidence showing that the sheet had been scorched on some prior occasion, we cannot regard it as presenting more than a scintilla of evidence, which will not justify a verdict against the physical and scientific facts that leave no room to doubt that the crown sheet had become dry and partially melted at the time of the collapse.

It appears from the testimony of the experts, that in case a crown sheet has been scorched and then cooled, that the stay bolts will be affected, and that thereafter there will be a leakage by the side of the bolts, and it is contended that this crown sheet had been known to leak before the accident. One witness spoke of its having leaked, but was unable to state whether it was before or after the accident. The place where it leaked, however, was stated by him to be where the crown sheet was joined on to the side of the boiler and was not at the place where it was scorched. The evidence was, therefore, unimportant. If the crown sheet was scorched at the time of the accident, it was the fault of the engineer, the co-servant of the deceased, and not that of the defendant.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

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CHARLES M. TITUS, Respondent, v. CHARLES F. POOLE et al.,
 as Executors, etc., Appellants.

It is not essential to the validity of a claim against the estate of a deceased person that it be stated with legal precision; it is sufficient if the transaction out of which the claim arises is identified, its general character indicated without technical formality and the amount of the claim stated.

A party presenting such a claim, which is rejected, cannot evade the Statute of Limitations prescribed in such cases (Code Civ. Pro. § 1822) by successive presentations of claims founded on the same transaction, but varying in form or detail.

Where, therefore, a claim was presented against an estate for an amount stated which was alleged to be due from the decedent in his lifetime on exchange of real estate for which he "fraudulently assigned" to the claimant a worthless certificate of alleged bank stock, which claim was rejected by the executors and thereafter a second claim was presented based on the same transaction, but setting out the representations made by the decedent in regard to the stock as a warranty instead of a fraud, which claim was also rejected, and more than six months after the rejection of the first claim an action was commenced based on a warranty, *held*, that plaintiff by the presentation of the original claim subjected himself to the conditions which attached on its rejection, and the statute commenced to run against any cause of action founded upon the transaction embraced in the claim, whether for deceit or warranty.

But, *held*, that the provision of the chapter of the Code of Civil Procedure in reference to "limitations of the time of enforcing a civil remedy," which declares that if an action is commenced within the time limited therefor, and * * * the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff * * * may commence a new action for the same cause after the expiration of the time so limited and within one year after such * * * termination," applies to actions against an executor upon a rejected claim against his decedent; and so, as it appeared that an action for fraud based on the original claim was brought within the six months, in which action plaintiff was non-suited, and within one year thereafter the second action was brought, that the case came within the saving provision, and that the action was not barred.

It appeared that the certificate was of stock in a supposed banking corporation in another state; that P., defendants' testator, stated to plaintiff at the time of the transfer that the bank was a regularly organized

bank; that he was one of the original or early stockholders; that the stock was a dividend paying stock; that it was worth 100 cents on the dollar, and was "good high stock," and that plaintiff thereupon agreed to and did take the stock at its par value. It also appeared that the bank was not incorporated, but was conducted by a partnership, and was at the time of the sale insolvent. *Held*, that the evidence justified a finding that the assertion as to the value and character of the stock was intended to be and was relied upon as a warranty, and for a breach thereof plaintiff was entitled to recover.

A vendor may give a warranty as to the value of the property sold, and if he makes a representation as to value, which is intended as a warranty, and it enters as a constituent element in the transaction, it becomes a part of the contract, and may be enforced as a warranty.

Reported below, 78 Hun, 389.

(Argued March 8, 1895; decided April 9, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made November 21, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

This action was brought to recover damages for a breach of warranty on the sale of certain shares of stock.

In February, 1883, the plaintiff, Titus, and defendants' testator, E. V. Poole, entered into an agreement whereby Poole was to purchase of Titus certain hotel property in the city of Ithaca at an agreed price of \$9,000; \$4,000 of which was paid by Mr. Poole assuming a mortgage for that amount then on the premises and \$5,000 by assigning to Titus a certain certificate of the alleged bank stock of the "Home Savings Bank" of South Waverly, Pa., it being for 50 shares of one hundred dollars each.

The negotiation for the sale took place at Ithaca, where the plaintiff resided, and was consummated there February 9, 1883, under the supervision of Mr. Ellsworth, by the conveyance by the plaintiff to Poole of the hotel property subject to a mortgage of \$4,000, and by the transfer and delivery by Poole to the plaintiff of the certificate. The certificate was printed and was in the following form:

"No. 33. State of Pennsylvania. 50 shares.

"The Home Savings Bank. Organized under act of Legislature of Pennsylvania.

"Authorized capital, \$100,000. Shares \$100 each.

"Virtue, Liberty, Independence.

"South Waverly.

"This is to certify that E. V. Poole is entitled to fifty shares in the capital stock of the Home Savings Bank of South Waverly, transferable only on the books of the bank in person, or by attorney on the surrender of this certificate.

"SOUTH WAVERLY, Dec. 10th, 1874.

"S. KIRBY,

"Prest.

"C. E. PENDLETON,

"Endorsed:

Cash'r."

It was transferred to the plaintiff by the indorsement of Poole, signed to the blank power of attorney printed on the back.

The action was brought December 26, 1888, against the executor of Poole for the breach of alleged warranties made by Poole on the transfer of the stock to the plaintiff, viz.: (1) That the Home Savings Bank was a regularly organized bank under the laws of Pennsylvania; (2) that it was all right, and that the stock was good, high stock and worth one hundred cents on the dollar; (3) that it was a dividend-paying stock. There was but one witness as to the transaction between Poole and the plaintiff, and his evidence is uncontradicted. One of the parties was dead and the plaintiff was not a competent witness. Ellsworth testifies that the parties being present in his office, Poole produced the certificate of stock and that the witness opened and looked at it and then said: "This isn't stock; that is a savings bank; a savings bank has no stock;" and Mr. Poole said: "It is a regularly organized bank under the laws of Pennsylvania and has savings bank privileges." The witness further testified: "Mr. Poole said in answer to my statement it was good stock, worth 100

cents on the dollar ; a dividend-paying stock ; that he was one of the original, or one of the early stockholders ; I don't know but he used the word 'first ;' Mr. Titus said, 'If that is so, Mr. Poole, and it is all right, I will take the stock at \$5,000 in the trade and deal.' He said the capital was all paid up ; I think he told the amount, \$100,000, if it was \$100,000 ; he said \$100,000 capital paid up. * * * He said it was worth 100 cents on the dollar and was good high stock. * * * I think he said what kind of hands the bank was in, but I do not recollect the language he used. Mr. Titus said at that time in Poole's presence, if the stock is all right as you say, we will make the trade or deal."

It appeared on the trial that the Home Savings Bank was not an incorporated bank, but was conducted by a partnership, of which one Kirby was the principal member. The business was established at Waverly, Pennsylvania, in 1873. It seems that in Pennsylvania there is no restriction upon individuals carrying on the business of private bankers. The laws of that state do authorize the establishment of banking corporations, subject to visitation, and the laws carefully guard the business of such corporations in the interest of stockholders and depositors. The capital stock of the Home Savings Bank was never paid up in full. When the stock in question was transferred by Poole to the plaintiff, there had been paid only the sum of \$86,338. The evidence establishes beyond controversy that in February, 1883, the bank was hopelessly insolvent. It held the paper of Kirby to an amount nearly equal to its paid-up capital, and when the bank failed in 1887 the debt of Kirby amounted to \$112,000, and but a small part of it has been paid. The public were not informed of the condition of the bank, and it was regarded by outsiders as solvent, and in some cases after that year the stock was sold in small amounts at par to persons who supposed the bank was incorporated. It paid occasional dividends from 1873 to 1887. It paid none in 1874, 1876, 1879, 1881, 1883, and none after 1884. The dividends when paid

were four per cent per annum, with the exception that eight per cent was paid in 1875.

Poole, the defendants' testator, died October 7, 1887, the same year that the bank went into bankruptcy, leaving a will by which he appointed the defendants his executors. May 7, 1888, the claimant presented a verified claim to the executors in words following: "Estate of Edward V. Poole, deceased. To Charles M. Titus, Dr. To amount due from E. V. Poole in his lifetime, on exchange of real estate for which a worthless certificate of alleged Home Savings Bank stock was fraudulently assigned to said Titus — \$5,000, with interest on the same from February 10, 1883," together with written offer to refer the same. June 19, 1888, the executors rejected the claim. June 28, 1888, the plaintiff brought suit in the Supreme Court against the executors, founded on the transaction, and alleging fraud and deceit on the part of the testator in respect to the transfer of the stock and the making by him of representations (substantially like those set forth in the complaint in this action), which were alleged to have been false and fraudulent, and the plaintiff claimed \$5,000 damages and interest from February 10, 1883. The action was tried in October, 1888, and resulted in a non-suit, on the ground that the facts proven did not constitute a cause of action. It was said on the argument that the precise ground of the non-suit was the failure of the plaintiff to prove the *scienter*. Subsequent to the non-suit, and on the 26th day of December, 1888, and more than six months after the rejection of the claim originally presented to the executors, the present action was brought, based on warranty and not on fraud. Before bringing the second action a second claim, based on the transaction of February 9, 1883, but setting out the representations as warranties, was presented and rejected. The action was tried before a jury, and resulted in a verdict for the plaintiff, \$7,647.75, being the sum of \$5,000, and interest thereon from February 9, 1883.

Other facts are stated in the opinion.

David M. Dean for appellants. This action is barred by the short Statute of Limitations (Code Civ. Pro. § 1882), and is not saved from such bar by Code of Civil Procedure, section 405. (*Wintermeyer v. Sherwood*, 77 Hun, 197; *Gillespie v. Wright*, 93 Cal. 169; *Titus v. Poole*, 60 Hun, 1; *Raynor v. Lauw*, 28 id. 35; *Eldred v. Eames*, 115 N. Y. 401; *Lockwood v. Robbins*, 125 Ind. 398; *Hill v. Bd. Suprs.*, 119 N. Y. 344; *Ross v. Mather*, 51 id. 108; *Sibley v. Hastings*, 21 Hun, 110; *Degraw v. Elmore*, 50 N. Y. 1; *Neudecker v. Kohlberg*, 81 id. 296.) The statement that the stock was good high stock and worth 100 cents on a dollar did not give the purchaser a cause of action for breach of warranty. (*Ellis v. Andrews*, 58 N. Y. 83; *Chrysler v. Canaday*, 90 id. 272; *Homer v. Perkins*, 124 Mass. 431; *Nash v. M. T. I. & T. Co.*, 159 Mass. 437.) The objection to the question, "Would you have purchased it (the stock) at all if you had known it was not an incorporated bank?" was erroneously overruled. (*Hallstead v. Coleman*, 143 Penn. St. 354; *In re Gibbs*, 157 id. 59.) The books of the Home Savings Bank and a transaction on the books of the Home Savings Bank were improperly allowed in evidence. (Code Civ. Pro. §§ 929, 930, 931.) The evidence of the financial condition of the Home Savings Bank in 1887 was improperly admitted under defendants' objection. (*Hutchings v. Hutchings*, 98 N. Y. 56.)

F. E. Tibbets for respondent. This action is not barred by the Statute of Limitations. (*Hayden v. Pierce*, 144 N. Y. 572; Code Civ. Pro. § 405; *Hoyt v. Bennett*, 50 N. Y. 538.) There was a warranty expressed and implied. (*Hubbell v. Meigs*, 50 N. Y. 481; *Smeltzer v. White*, 92 id. 390-399; *Chase v. Evarts*, 47 N. Y. S. R. 426; *Simar v. Canaday*, 53 N. Y. 298; *Hawkins v. Pemberton*, 51 id. 188; *Shipper v. Bowen*, 122 U. S. 575; *Ross v. Terry*, 63 N. Y. 613; *D. Bank v. Jarvis*, 20 id. 226, 229; *Webb v. Odell*, 49 id. 583; *Mandeville v. Newton*, 119 id. 10, 14.) The question, "Would you have purchased it at all if you had known it was

not an incorporated bank?" was proper. (*King v. Fitch*, 2 Abb. Ct. App. Dec. 509.) The introduction of the books of the Home Savings Bank, and of transcripts taken from them as provided by sections 929 to 931 of the Code, was proper. (*Titus v. Poole*, 73 Hun, 383; 1 Greenl. on Ev. § 93; *Burton v. Drake*, 20 Wall. 125; *F. N. Bank of Whitehall v. Tisdell*, 84 N. Y. 655; *Van Sachs v. Kretz*, 72 id. 552.) This is an action on contract, and, although plaintiff has alleged warranty, he can recover, even though no warranty is proven, if the thing bought is worthless, and if (as in the case at bar) an offer to return has been made and refused. (*Stone v. Frost*, 61 N. Y. 614.)

ANDREWS, Ch. J. The principal question arises upon the defense of the short Statute of Limitations applicable to claims against the estate of a decedent, presented to an executor or administrator after the publication of notice for the presentation of claims, pursuant to the order of the surrogate, and disputed or rejected by him and not referred. Section 1822 of the Code of Civil Procedure, which is a substantial re-enactment of a provision in the Revised Statutes, declares that in such cases the claimant must commence an action for the recovery of the claim against the executor or administrator within six months after the dispute or rejection; or, if no part of the debt is then due, within six months after a part thereof becomes due, and "in default thereof, he and all persons claiming under him are forever barred from maintaining such an action thereupon, and from every other remedy to enforce payment thereof out of the decedent's property." It is plain that if section 1822 of the Code is the only provision applicable to the case, the claim of the plaintiff was barred at the time of the commencement of the action. The decedent died October 7, 1887, and the executors having duly advertised for the presentation of claims the claim of the plaintiff was presented May 7, 1888, and was rejected by the executors June 19, 1888, and not having been referred this action was commenced December 26, 1888, more than six

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months after the rejection of the claim. The claim, if any existed, was due at the decedent's death, and all the conditions existed which made the six months' limitation a bar to the action, if the section referred to is alone to be considered. The fact that a second claim was presented November 29, 1888, was immaterial. The claim then presented was founded on the same transaction as that specified in the claim first presented. It was for the same amount, and it differs from the claim originally presented only in the circumstances that it ignores the suggestion of fraud, and sets forth in detail the representations made by the decedent to induce the plaintiff to accept the certificate of stock in the Home Savings Bank, and treats them as warranties. The transaction set forth in the first claim was sufficient to apprise the executors that it was founded on the transfer of the certificate of stock by the decedent to the plaintiff, and that out of the transaction there might arise either an action for deceit or for breach of warranty, or for failure of consideration, and if a reference had then been had evidence to support either of these claims might have been given and a recovery had for either cause of action if established by evidence. Proceedings under the statute to determine claims against the estate of a decedent are informal. There are no pleadings in the ordinary acceptation of the term. It is not required that the claim presented shall be stated with legal precision. It is sufficient if the transaction out of which the claim arises is identified and its general character indicated, without technical formality, and the amount of the claim is stated. The plaintiff, therefore, by the presentation of his original claim, under the statute subjected himself to the conditions which attached on its rejection, and thereupon the statute commenced to run against any cause of action founded upon the transaction embraced in the claim, whether an action for deceit or for breach of warranty. The party who presents a claim which is rejected cannot be permitted to evade the Statute by successive presentations of claims founded on the same transaction, but varying in form or detail. The case is, therefore, to be considered as if the claim had been but

once presented at a period more than six months prior to the commencement of the present action.

It is conceded that if section 405 of the Code, in the chapter upon "limitations of the time of enforcing a civil remedy," is applicable to actions brought against an executor or administrator upon a claim against a decedent, which has been rejected by the executor or administrator after presentation, pursuant to notice, the cause of action was not barred when the action was commenced. The first action was brought within six months after the rejection of the claim, and terminated in a non-suit, and this action was brought within two months thereafter, but seven days after the expiration of the six months from the time of the original rejection of the claim. The case is, therefore, brought directly within the saving provision of section 405 of the Code, if applicable to this case. That section declares that "if an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal, without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if he dies and the cause of action survives, his representatives, may commence a new action for the same cause, after the expiration of the time so limited, and within one year after such reversal or termination." The first action was terminated by non-suit, was not voluntarily discontinued, was not dismissed for neglect of prosecution, nor was there any final judgment therein on the merits, and the present action was brought within a year after the termination of the former action. The second action also was an action for the same cause as the first action, within the meaning of section 405. According to the nomenclature of actions the first was an action for fraud and the second on warranty — one *ex delicto* and the other *ex contractu*. It is often important to observe the distinction. But the same facts may often give a plaintiff the right to bring the one action or the other at his election, and when dealing with remedies with a view to determine

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whether remedies applicable to actions of the one kind or the other are to be administered, it is common and proper to speak of the two remedies as based upon distinct and different causes of action, although the right in both cases is founded upon the same transaction. But it cannot be supposed that the words "same cause" in section 405 were intended to have this narrow meaning. Such a construction of a beneficial provision, intended to preserve and continue the right of parties, would be very inconvenient, and would often defeat the purpose of the statute. The words were intended, we think, to remove the disability whenever a new suit was brought within the year, based upon the same transaction as the former one, without regard to its technical form, and was intended in part to prevent mere mistakes as to the form of the remedy from concluding the party from subsequently pursuing his real right under a more appropriate form of action.

Coming, therefore, to the question whether section 405 applies to actions under section 1822, it is to be observed that there could be no doubt of its application except for the provisions of section 414. That section, so far as it affects the question now under consideration, is as follows: "Sec. 414. The provisions of this chapter apply and constitute the only rules of limitation applicable to a civil action or special proceeding, except in one of the following cases: (1) A case where a different limitation is specially prescribed by law, or a shorter limitation is prescribed by the written contract of the parties." The general purpose of the exception in this section seems plain. It was to preserve limitations prescribed by special statute or by the contract of parties, and to prevent any misapprehension that actions subject to special limitations by statute or contract were affected by the periods of limitation prescribed in chapter four in the several classes of action therein specified. The statutes prescribing special and unusual limitations are numerous. Many of them are enumerated in a note to section 414 by Mr. Throop. They are frequently cases which would fall within the classes enumerated in the general chapter, except

as taken out by the special law. The legislature, by section 414, preserved the special cases from the operation of the general rule of limitation prescribed in chapter four. Section 414 does not declare in terms that section 405 and other general provisions in title three of chapter four shall not apply to actions governed by section 1822. If it is construed as though it affirmatively declared that the "rules of limitation" in chapter four shall not be applicable when a different limitation is specially prescribed by law, then the question arises, is the provision of section 405 a "rule of limitation" within the language of section 414, or do these words refer to those specific periods prescribed in articles first and second of chapter four for the bringing of actions? This would seem to have been all that could reasonably have been intended. It preserved the special limitations where they differed from the limitations in the general statute. To restrict the general provisions in article three to cases subject to the limitations of the general statute would often be productive of great injustice. Among these general provisions are those which prescribe what shall be deemed the commencement of an action; what shall be the consequence of the absence of a defendant from the state; the effect of the death of the plaintiff; of an injunction preventing the commencement of an action; and section 405 provides for the case of the termination of an action and an enlargement of the time, under the circumstances specified. The present case illustrates the hardship which would often follow if the benignant provisions in the general act were held to be inapplicable to cases of special limitation. The plaintiff was non-suited in the first action and has succeeded in this. He was defeated in his first action presumably because he had mistaken his remedy. He then brought his second action. The statute is a bar unless saved by section 405. We had occasion recently to decide a very similar question in the case of *Hayden v. Pierce* (144 N. Y. 512), and the reasoning in the careful opinion in that case is applicable to this case. It was there held that section 401 of the general provisions of chapter four of the Code

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was applicable to a cause of action against executors, which was subject to the six months limitation prescribed by section 1822, and that absence of the executor from the state when the cause of action accrued enlarged the limitation of section 1822, so as to exclude such absence in the computation of time.

The principle of this case is decisive against the defense of the Statute of Limitations in the case at bar. It becomes unnecessary, in view of this decision, to review the various decisions theretofore made, bearing more or less upon the subject. We adhere to the decision in *Hayden v. Pierce* as a sound and reasonable construction of the somewhat ambiguous provisions of section 414. There is an apparent incongruity in the particular case, that the legislature should give to a plaintiff a year after the termination of the former suit to bring an action against an executor or administrator, when the original action must have been brought within six months after the rejection of the claim. But the legislature was declaring a general rule applicable to all cases, and made no distinction, as it might perhaps have done, if its attention had been drawn to the special case of an action to enforce a claim against the estate of a decedent which had been presented and rejected.

Exceptions were taken by the defendants on the trial to the admission and rejection of evidence and to the charge of the court. We deem it unnecessary to refer to more than one of the exceptions, and that exception raises the question as to the propriety of permitting the jury to find that there was a warranty of the value of the stock. It is well settled that a mere naked representation by a vendor of the value of property sold is to be regarded as an expression of opinion merely, and will not sustain an action for deceit, although the representation was known to the vendor to be untrue and was made with intention to deceive the purchaser. The case of *Ellis v. Andrews* (56 N. Y. 83) was a case of this character. The doctrine that such a representation is mere dealers' talk was applied in that case, and Mr. Benjamin, in his work on Sales, regarded it as having carried the doctrine "very far" (1 Benj. on Sales, p. 561). But a vendor may give a warranty as to

value as in respect of any other fact, and if he makes a representation as to value, which is intended as a warranty, and it enters as a constituent element into the transaction, it will then become a part of the contract and may be enforced as a warranty. The learned author referred to, speaking of the subject, says (Sec. 932, p. 811): "And in determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case there is a warranty; in the latter not." The court, in the charge to the jury, properly instructed them that the naked expression of opinion as to value of property made by the vendor is not a warranty upon which a recovery could be had, but added, "if you find that what Mr. Poole stated was intended to be an affirmative fact upon which he intended this man to rely, that the stock was worth 100 cents on the dollar, he being one of the original stockholders or owners himself claiming to have knowledge that it was worth 100 cents on the dollar, it is for you to say whether it amounted to something more than the expression of an opinion." Whether a particular affirmation made by a vendor on an oral contract for the sale of property was intended as a warranty is often a question for the jury. (*Shippen v. Bowen*, 122 U. S. 575, and cases cited.) Many circumstances in this case might properly be considered as bearing upon the question; the fact that the sale was not of a chattel, open to inspection by the purchaser, but of stock in a supposed corporation in another state; the assertion made by the vendor in connection with the statement of value, that he was one of the original or early stockholders, and that the stock was a dividend-paying stock (which was true only in a very limited sense); the fact that it was only after these statements were made that the plaintiff agreed to take the stock at its par value, saying to Mr. Poole: "If the stock is all right, as you say, we will make the trade." We think the jury might well

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have found, upon all the circumstances, that the assertion of Mr. Poole, as to the value and character of the stock, was something more than the expression of a mere naked opinion, and was intended to be and was relied upon as a warranty of the fact. The vendor assumed to know the value of the stock, and stated circumstances calculated to impress the plaintiff with the belief that the value was known to him. The plaintiff was about to take the stock as payment at its face value for his property. It was natural that he should require information as to its value, and both parties must have regarded the affirmation of the vendor on the subject as a material element in the transaction. We think there was no error in submitting this question to the jury.

We find no error in the record requiring a reversal of the judgment, and it should, therefore, be affirmed.

All concur.

Judgment affirmed.

PETER J. SODERMAN, Respondent, v. WILLIAM KEMP et al.,
Appellants.

In an action to recover damages for alleged negligence these facts appeared:

The T. S. & I. Co., the original defendant, used cars drawn by a locomotive for the purpose of removing its furnace refuse. Plaintiff, an employee engaged in assisting in this work, was riding on top of the load of a car, when it suddenly dumped, throwing plaintiff on the ground and causing the injury complained of. The car dumped on one side only, and the body when in place was fastened to the truck and held in position by means of two hooks; when these were properly adjusted to the bar upon the truck the car body could not overturn. It was the duty of the employees after the car was dumped to crank it back into place and adjust the hooks. The car had made one previous trip on the morning of the accident. On the previous trip after the car was unloaded it was cranked back and the hooks attached by two other employees. The car with others of a similar pattern had been in daily use for several years. On the return trip after the accident the car was examined by the car repairer, who found nothing the matter with the hooks or the car; it was again put in use without anything having been done to it, and it was in continuous use thereafter. No similar dumping of the car was shown to have occurred either before or

after the accident. It was claimed that one of the hooks was slightly straightened toward the point, but it did not appear that its holding power was affected or that the alleged defect had anything to do with the overturning of the car or was of such a nature as to prevent the continued or safe service of the car, or to require any repair. *Held*, that the evidence did not justify a recovery; that the natural inference was the accident was caused by the negligence of plaintiff's co-employees in failing to properly adjust the hooks after the car was dumped on the first trip.

Soderman v. Troy Steel & Iron Co. (70 Hun, 449), reversed.

(Argued March 8, 1895; decided April 9, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 9, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict.

This action was brought against the Troy Iron and Steel Company, the original defendant, to recover damages for injuries received by plaintiff alleged to have been caused by said defendant's negligence.

The facts, so far as material, are stated in the opinion.

R. A. Parmenter for appellant. Upon the whole evidence, or any reasonable construction of it, this action ought not to be maintained, and the judgment affirming the verdict should be reversed. (*Ungar v. F. S. S. R. Co.*, 57 N. Y. 500.) A non-suit is the proper remedy when the trial judge can see that the plaintiff, upon whom the onus of proof rests, has failed to produce such evidence as will justify a verdict in his favor. (*Dwight v. G. L. Ins. Co.*, 103 N. Y. 359; *Corcoran v. D., L. & W. R. R. Co.*, 47 N. Y. S. R. 147; *Arnold v. D. & H. C. Co.*, 125 N. Y. 15; *DeGraff v. N. Y. C., etc., R. R. Co.*, 76 id. 125; *Crown v. Orr*, 140 id. 450; *Dingley v. S. K. Co.*, 134 id. 552; *Shields v. N. Y. C., etc., Co.*, 133 id. 557; *Dana v. C. P. I. Co.*, 51 N. Y. S. R. 238; *Williams v. D., L. & W. R. R. Co.*, 116 N. Y. 628.) The trial judge erred in declining to charge as requested, that the jury might disregard the testimony of defendant's wife without any direct contradiction. (*Elwood v. W. U. T. Co.*, 45

N. Y. 549, 554; *Kavanaugh v. Wilson*, 70 id. 179; *Gilder-sleeve v. Landon*, 73 id. 609; *B. C. R. Co. v. Strong*, 75 id. 591; *Koehler v. Adler*, 78 id. 291, 292; *Wohlfahrt v. Beckert*, 92 id. 497, 498; *Kearney v. Mayor, etc.*, 92 id. 621; *Supple v. State*, 99 id. 289, 290.)

James Lansing for respondent. The plaintiff's testimony tended to show a defective car and his injury thereby, through the negligence of the defendant. (*Steinweig v. E. R. Co.*, 43 N. Y. 123; *Caldwell v. N. J. S. Co.*, 47 id. 288.) The plaintiff was injured solely by the negligence of the defendant. Every master using machinery in his business owes the duty to his employees: (1) To furnish safe and suitable machinery; (2) to keep it in repair; (3) to use proper inspection for the purpose of discovering defects which may arise from its use. (*Fuller v. Jewett*, 80 N. Y. 46; *Bailey v. R., W. & O. R. R. Co.*, 139 id. 302; *Wright v. R., W. & O. R. R. Co.*, 25 id. 566; *J. R. M. Co. v. N. H. S. Co.*, 50 id. 121, 127; *Seybolt v. N. Y., L. E. & W. R. R. Co.*, 95 id. 568.) The exceptions taken to the admission of evidence, and to the charge of the court, are untenable. (*Baird v. Daily*, 68 N. Y. 551; *Hine v. Bowe*, 114 id. 350; *Moody v. Osgood*, 54 id. 488; *Elwood v. W. U. T. Co.*, 45 id. 549; *Kelly v. Burroughs*, 102 id. 93.)

GRAY, J. The plaintiff has recovered damages against the defendant for personal injuries sustained by him, upon a claim that it was negligent. In our judgment, the evidence was altogether insufficient to establish any cause of action and the defendants' motion for a non-suit should have been granted. There was nothing disclosed in the circumstances surrounding the occurrence, which evidenced any failure of that duty which the defendant owed to the plaintiff as its employé, and it was error to submit the case to the jury for a verdict, when no inference of neglect was possible.

The defendant was engaged in the manufacture of steel and iron and the plaintiff had been in its employ as a laborer for

about nine years. In August, 1888, he was directed to assist in loading up slag, sand and dirt from the defendant's pit upon a car. The car was one that dumped its load on the side and was in a train, which was drawn by a locomotive to a point, or "dump," at some distance from the works. The plaintiff and another man, who had helped him to load the car, rode upon it; the plaintiff sitting upon the top of the load and his associate upon the end of the car. They had made one trip that morning and, at the time of the accident, were making a second trip to the dump. After they had proceeded a short distance from the works, the car suddenly dumped and threw the plaintiff upon the ground. He says that he struck upon his face and shoulder and that an iron bar fell upon him, as well as a large part of the load; as the result of which he was seriously injured. The defendant used three kinds of cars for the purpose of carrying away the furnace refuse. Some were double side dumpers; some dumped on both sides and at the end and some, like the one upon which the plaintiff rode, dumped only on the one side. The car in question was, in some respects, of an older pattern than the others. The mode of fastening the car body to the truck was by means of two hooks, which were attached to a fixed bar upon the car truck and which served, when in place, to hold the car body in position and to prevent it from dumping. It was the duty of the men employed about the car, after it was dumped, to crank it back into place and to adjust the hooks. Upon the morning in question, the plaintiff says that upon the first trip down to the dump, and after the car had been unloaded, it was cranked back and the hooks were attached by two of the men on the train. The plaintiff did not look to see if the hooks were on, upon either trip; and he does not claim to have discovered any thing wrong about the car on either trip, up to the time of the accident. Neither does he personally give any account of the car immediately after the accident. In order, however, to attribute the cause of the accident to some negligence on the part of the defendant, he called and examined several witnesses, who were fellow-laborers with him. Their evidence

failed to make out any case, however, and even tended to discredit his own story as to the manner in which he was injured — an unimportant matter, however. One witness was the brakeman on the dumping train, who was riding at the time upon the engine. The train was composed of five or six cars, and was proceeding at the moderate speed of about three miles an hour, and, when the car dumped, was stopped almost immediately. The brakeman saw the dumping and went back to where the plaintiff was sitting upon the ground. He says that that was the only time he had ever seen the car dump in that way; that he had never seen it dump with the hooks on; that he saw nothing the matter with the hooks when he went back to where the plaintiff was. Another witness, who was riding upon the engine, saw the accident, and, after the train had backed to the furnace and the car in question had been put upon the side track to be repaired, if needed, he told the car repairer of the defendant, that the car had dumped and that he thought one hook was slightly bent or straightened. The car repairer looked at the hook, but, finding nothing the matter, did not take the car to the shop for repairs. The car was again put in use without anything being done to it and continued to be used. Two or three months after the accident, the plaintiff went with a draughtsman to the works for the purpose of finding the car and of examining it. He found a car in the yard house, which was a single side dumper, and pointed it out to the draughtsman as being the one which had thrown him off. The draughtsman was examined as a witness for the plaintiff and testified that the hooks on the car shown him had been either repaired, or were new hooks. He also testified that the car was defective in certain respects. In describing the car which he saw, he said that the door, or board, on the side, which opened for the discharge of the load, was hinged at the top and opened from the bottom outward. The plaintiff did not identify the car by any number, and that it was the identical car was made altogether improbable by the testimony of the plaintiff's own witnesses, who described the one in use at the time of the acci-

dent as having a door on the side, which was attached by hinges to the bottom of the car and was fastened by hooks at the top. The evidence with reference to the description of the car by the plaintiff's witnesses, who were with him at the time of the accident, was corroborated by that of the witnesses for the defendant; who were the engineer upon the locomotive, the car repairer and the foreman of the laboring force. They all testified positively that the car in use at the time had its side board, or door, attached by hinges at the bottom of the body and was hooked at the top. The car repairer testified that the company had no single side dumpers in use, that had the side open at the bottom. With respect to a possible defect in one of the hooks which held the body of the car in place, there was not only no evidence that it had been so bent, or that it was so out of order, as to be unserviceable; but all the evidence was to the effect that its usefulness was unimpaired. The car was placed upon the side track, on the return trip, merely because it had dumped, and in order that it might be examined, and to see if it needed repairs. It was not sent to the repair shop. No defect was found about the car gear and it was put within half an hour back upon the train and, as some of the witnesses testified, it worked all right. It was in continuous use thereafter and was never known to have been taken out of the service. The bending or straightening of the hook, which plaintiff's witness had spoken of in his testimony, was described as being a slight straightening towards the point of the hook; but its holding power was not affected. The draughtsman in the employ of the defendant made a diagram of the car, after having been shown it by the car repairer, who had marked the car, and he described it in all its details. The case was, therefore, left, upon all the evidence, without any other proof in aid of the plaintiff's complaint than that the car had overturned with him, and the defect, upon which he relied for the purpose of establishing a neglect of duty on the part of his employer, could only consist in the feature of the slightly straightened point of the hook. But there is no evidence in

the case, which shows that that had anything to do with causing the overturning of the car, or that it was of such a nature as to require any attention or repair, or such as to prevent the continued and safe service of the car.

Nor does the evidence show that the car was unfit for the purposes for which it was used. With several others of a similar description, it had been used for years and was continued in use. While there were other cars of more or less different construction and design, nothing in the evidence warrants the inference that its use was a source of danger to the defendant's employés.

The defendant was bound to furnish safe appliances and cars in the transaction of that part of its business; but it was not bound to furnish the most approved, or newest, design of dump cars, or any particular description of such cars; so long as those which it did furnish were not dangerous to those who had to work in and about them. This car had been in daily use for a long time and had proved itself safe and there was no evidence that it was otherwise. Its continued use was proper enough. It was proved in the case that, when the hooks on the car body were adjusted to the fixed bar upon the truck, the car could not overturn; but, if they were not so adjusted, it was quite possible, if any considerable movement was communicated to the car body, by the motion of the train from the unevenness of the track, or from any other cause, that the car might overturn. Upon the evidence, there is a very natural inference, which can be drawn to account for the accident, and that is that the fellow-workmen of the plaintiff had neglected to properly adjust the hooks, after the car had been dumped upon the first trip. That duty belonged to the laborers upon the train and, if it was not properly performed, any resulting accident would not be attributable to the defendant's, but to their neglect.

If the plaintiff had given any evidence going to show that there was some defect about this car, or its gear, which made its use improper, we might then have a case where a conflict

between his evidence and the evidence on the part of the defendant might fairly be submitted for the consideration of the jury; but there was no such conflict. The evidence is overwhelming to show, that the car, which the plaintiff pointed out to his draughtsman for the purpose of description to the jury, could not have been the car from which he fell. His own testimony, that it was the same car, is not only not substantiated by some identification, as by a mark or number; but it was contradicted by the evidence of his own witnesses, as well as by that of the defendants'.

So far as appears from the evidence, if the accident was not caused by some neglect on the part of the plaintiff's fellow-workmen, in properly adjusting the hooks of the car, it was an unexplained occurrence, which does not permit of any inference of some neglect on the part of the defendant; or, where, to put the case at its strongest, the inference of an entire freedom from any failure of duty on the part of the defendant is quite as consistent, upon the evidence, as an inference that there had been in some manner an omission of a duty. A recovery in these cases must rest upon affirmative evidence of some violation or neglect of duty. The burden is upon the plaintiff to negative the presumptions in favor of his employer, and it is not enough that he shows an injury sustained, but he must go further and show some specific act of negligence.

The judgment appealed from should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
WILLIAM F. RATHBONE, Appellant.

A notary public is a public officer within the meaning of the provision of the State Constitution (Art. 13, § 5) prohibiting a "public officer or a person elected or appointed to a public office under the laws of this state" from receiving from any person or corporation or making use of "any free pass, free transportation," etc.

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146	294
145	434
148	198
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155	389
145	434
163	22
163	36

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Statement of case.

A notary public who, before the Constitution went into effect, had rightfully received a free pass over a railroad, is, by said provision, prohibited from thereafter using it while he continues to hold the office. For a violation of this provision by a notary public, an action by the People is maintainable against him to have his office adjudged to be forfeited.

(Argued March 11, 1895; decided April 9, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made February 12, 1895, which affirmed an interlocutory judgment in favor of plaintiff entered upon an order overruling a demurrer to the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Lewis E. Carr for appellant. A notary public is not a public officer within the meaning and intent of subdivision 5 of article 13 of the new Constitution, and, therefore, not subject to its provisions. (*R. R. Co. v. McClure*, 10 Wall. 511; *Newell v. People*, 7 N. Y. 9; *Riggs v. Palmer*, 115 id. 506; *In re Livingston*, 121 id. 94, 104; *People ex rel. v. Potter*, 47 id. 375, 379; *People v. Smith*, 47 id. 330, 336, 337; *R. R. Co. v. Roach*, 80 id. 339, 344; *People ex rel. v. Angle*, 109 id. 564, 568; *O'Brien v. Mayor, etc.*, 139 id. 543, 588; *Dibble v. Hathaway*, 11 Hun, 571, 574, 575; *Matter of Oaths of Attorneys*, 20 Johns. 492, 493; *Nostrand Case*, 47 N. Y. 375, 381, 382; *Smith v. Mayor, etc.*, 37 id. 518, 520; *Hathaway Case*, 71 id. 238, 243; *Young v. Bryan*, 6 Wheat. 146; *Whitaker v. Masterton*, 106 N. Y. 280, 282; *Bonnell v. Griswold*, 80 id. 128, 138; *Dean v. M. E. R. R. Co.*, 109 id. 540.) If, however, the court is constrained to hold that a notary is a public officer within the constitutional provision, defendant cannot, under the statement of facts contained in the complaint, be subjected to its penal consequences. (*Hartung Case*, 22 N. Y. 95; *Ratzky Case*, 29 id. 124; *O'Neil Case*, 109 id. 251; *Southwick v. Southwick*, 49 id. 510; *Sher-*

Ill v. Christ Church, 121 id. 701; *S. R. T. Co. v. Mayor, etc.*, 128 id. 510; *Dash v. Van Kleecke*, 7 Johns. 477.)

T. E. Hancock, Attorney-General, for respondent. The defendant has violated the provisions of section 5, article XIII of the Constitution, and the order and judgment should be affirmed. (Laws of 1892, chaps. 681, 683; Revised Const. art. 13, § 5, art. 15, § 1.) There being no ambiguity in the language used, the scope of the constitutional provision must be held to embrace the defendant. (Suth. Stat. Const.; *People v. Lorillard*, 135 N. Y. 285-289.) The section being clear and explicit, it is not allowable to go outside of the language used for the purpose of invoking any rule of construction which may be applicable to words of doubtful meaning. (Suth. Stat. Const. § 235; *McCluskey v. Cromwell*, 11 N. Y. 601; *People v. Schoonmaker*, 63 Barb. 44; *Benton v. Wickwire*, 54 N. Y. 226; *Newell v. People*, 7 id. 97; Story on Const. § 404.)

GRAY, J. This action was brought to have the office held by the defendant as a notary public, in and for the county of Albany, in this state, adjudged to have been forfeited, for the violation by him of that provision of the Constitution of the state, which prohibits a "public officer or person elected or appointed to a public office under the laws of this state" from receiving "any free pass, free transportation, franking privilege, &c., &c., from any person or corporation," or from making use of the same. The constitutional provision referred to is contained in section 5 of article 13 of the Constitution of this state, which was adopted at the last general election and which went into effect on January 1st, 1895. The defendant demurred to the People's complaint, for not containing facts sufficient to constitute a cause of action; and the question for our determination is whether a notary public fills a public office and is a public officer within the meaning of the constitutional provision.

The argument for the appellant proceeds upon the theory

that it could not have been intended to include such an office within a constitutional prohibition, which, obviously, was designed to guard against the mischief of a person, engaged in the discharge of the functions of a public office, being influenced in his action by a consideration for the corporations giving to him free passes or privileges. That a notary public is a public officer, I do not think to be open to serious doubt. He is one of the "public officers of this state," concerning whom chapter V of the Revised Statutes treats, and he is therein placed "in the class of judicial officers." The office of a notary public must be filled by appointment of the governor of the state, with the consent of the senate. The appointee, before he enters upon the duties of his office, is required to take and to file an oath to support the Constitution of the United States and of the state and to faithfully discharge the duties of his office. (R. S. chap. V, art. III.) His term of office is fixed by law and in chapter III of the Revised Statutes are contained "general provisions concerning the powers and duties of certain judicial officers;" among whom are specified notaries public. All their powers are defined by law and their acts, within their legitimate sphere, have force and solemnity, because having the express authorization and sanction of statute. The very designation of "notary public" indicates a relation, which the incumbent of the office sustains to the body politic. It is impossible to regard him as other than a public officer and we are brought to the consideration of the proposition of the appellant, that his could not be one of the public offices intended to be included within the constitutional provision in question.

I concede the difficulty, indeed the impossibility, of seeing any reason why a notary public should be prohibited from accepting any privileges or favors from corporations. On its face the proposition seems absurd and it is not easy to see the wisdom, or necessity, of incorporating in our Constitution a prohibition, so unnecessarily comprehensive in its terms; when it would have been possible to specify the public officers who were probably aimed at. But it is plainly to be

read there and for the very reason that it was possible to designate the public officers, who should be restrained from accepting the favors of corporations, we are, perhaps, the less able to disregard it. In the construction of constitutional provisions, the language used, if plain and precise, should be given its full effect and we are not concerned with the wisdom of their insertion. As adopted by the People the intent is to be ascertained, not from speculating upon the subject; but from the words in which the will of the People has been expressed. To hold otherwise would be dangerous to our political institutions. The Constitution is the basis upon which rests that complicated social organization called the state. It must be presumed that its framers understood the force of the language used and, as well, the people who adopted it. Not only were the revisers of the Constitution chargeable with knowledge as to who, under our laws, were regarded as public officers; but it is to be presumed that they used the words "public officer or person elected or appointed to a public office under the laws of this state," with some, if not a direct, reference, to the classification made in the Revised Statutes. It is not necessary to suppose that they had in mind notaries public, but that, knowing of the existence of the various classes of public officers created by statute, they intended, by the use of general words, to include all persons holding offices in the gift of the People. The latitude allowed in the construction of legislative acts is out of place, and would be unwise, when interpreting the fundamental law. Legislation aims at arranging the mechanism of the state for the benefit of its members and the question of intention, necessarily, is often of great importance and must be open to judicial inquiry; but the Constitution, which underlies and sustains the social structure of the state, must be beyond being shaken, or affected, by unnecessary construction, or by the refinements of legal reasoning. We may be compelled to have resort to such in the presence of contradictions, or of meaningless clauses; but not otherwise. I see no case here for surmising as to the possible, or even probable,

meaning of the section in question. The People have plainly declared in precise and unambiguous words that no public officer shall receive or make use of a pass, and, within the territorial limits of the state, that command is enforceable, and it must be obeyed by every person who holds an office, which, like the one before us, is public in its relations to the body politic, by reason of the mode of its creation and of the powers conferred and functions defined by the law. We are not to look beyond the instrument, for the purpose of ascertaining the mischief against which the clause was directed, and thus restrict its operation. The only assumption, that we have any right to indulge in, is that it was made as sweeping in its terms, in order to prevent doubts and to obviate refinements of reasoning as to its application to particular cases, under the varying conditions of our political life. I cannot do better than, at this point, to append some forcible remarks made by two eminent judges of this state. In *People v. Purdy* (2 Hill, 35), BRONSON, J., delivering the opinion of the court as to the construction of that clause of the Constitution which provides that "the assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill creating, continuing, altering or renewing any body politic or corporate," said: "These words are as broad in their signification as any which could have been selected for the occasion from our vocabulary, and there is not a syllable in the whole instrument tending in the slightest degree to limit or qualify the universality of the language. If the clause can be so construed that it shall not extend alike to *all* corporations, whether public or private, it may then, I think, be set down as an established fact, that the English language is too poor for the framing of fundamental laws which shall limit the powers of the legislative branch of the government."

In *Newell v. The People* (7 N. Y. 9), JOHNSON, J., laid down this rule with reference to constitutional construction: "If * * * the words embody a definite meaning, which involves no absurdity, and no contradiction between different parts of the same writing, then the meaning apparent upon

the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed; in such a case there is no room for construction. That which the words declare is the meaning of the instrument, and neither courts nor legislatures have the right to add or to take away from that meaning. This is true of every instrument, but when we are speaking of the most solemn and deliberate of all human writings, those which ordain the fundamental law of states, the rule rises to a very high degree of significance. It must be very plain, nay, absolutely certain, that the People did not intend what the language they have employed, in its natural signification, imports, before a court will feel itself at liberty to depart from the plain reading of a constitutional provision."

The further point that the defendant cannot be subjected to the penal consequences of this constitutional provision is untenable; inasmuch as the public officer is prohibited from making use of a pass, as well as from receiving one. It is no answer to say that the appellant, having rightfully received a free pass for transportation over the railroad before the Constitution went into effect, cannot be prevented from using what is his property. It is doubtful whether it is to be regarded as property, in the true sense of the term. But that is of slight importance. As a privilege extended to him by the corporation, the People may say to him that, while holding from them his public office, he shall not make use of this privilege. The provision was designed for the benefit of the public and had no other object than to do away utterly with the power of corporations to influence any public officer in the performance of the duties of his office.

For these reasons I think the order and judgment below should be affirmed.

All concur (BARTLETT, J., in result).

Order and judgment affirmed.

PORTER M. FRENCH, as Receiver, etc., Appellant, v. EZRA R.
ANDREWS, Respondent.

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Where the officers of a corporation have merely permitted one of its creditors to obtain judgment against it in the regular course of legal proceedings, this is not a transfer or assignment of its property within the meaning of the provision of the "Stock Corporation Act" of 1890 (§ 48, chap. 564, Laws of 1890), which prohibits a corporation, that has refused to pay any of its obligations when due, or any of its officers, from making any such transfer or assignment to any person in contemplation of its insolvency.

On September 10, 1891, the J. V. S. Co., a manufacturing corporation, was indebted to defendant in the sum of \$10,976.19; a portion of the indebtedness was represented by notes not then due; the balance was upon account. On that day the defendant surrendered the notes and received for the whole indebtedness ten notes of \$1,000 each, and another for the balance, all payable on demand. These notes were thus given in order that defendant might immediately bring suit on each of them in the Municipal Court of Rochester, wherein judgment could be obtained by default in six days, and the jurisdiction of which is limited to \$1,000. Both the treasurer of the company, who gave the notes, and defendant knew at the time that the company was unable to pay its debts as they matured. An action was immediately commenced in said court by defendant on each of said notes, and, on September seventeenth, a judgment in each action was taken by default. In an action brought by plaintiff, who was subsequently appointed a receiver of said company, to set aside said judgments, *held*, that the transaction was not a violation of said statutory provision; and so, that the action was not maintainable. (BARTLETT, J., dissenting, so far as the judgments were concerned, which represented the indebtedness not due at the time of the transaction.)

Throop v. Hatch Lithographic Co. (125 N. Y. 530), distinguished.
Reported below, 81 Hun. 272.

(Argued March 13, 1895; decided April 9, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 20, 1894, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

This action was brought to set aside and have declared illegal and void eleven judgments recovered by defendant against the James Vick, Seedsman, Company.

The facts, so far as material, are stated in the opinion.

Joseph S. Hunn for appellant. The act of giving the notes and obtaining judgments and executions thereon was substantially and purposely an attempt to evade the statute prohibiting transfers by corporations. (Laws of 1890, chap. 564, § 18; *Kingsley v. Bank*, 31 Hun, 329; *Throop v. H. L. Co.*, 125 N. Y. 534.) The transaction was initiated and conducted by the active interference of an officer of the corporation. (*Varnum v. Hart*, 119 N. Y. 101.)

William F. Cogswell for respondent. There was no transfer or assignment of the property within any fair meaning of these words. (*Sands v. Hill*, 55 N. Y. 18.) Nothing that was done by the treasurer of the corporation was in conflict with the statute as it stood at the time when these judgments were recovered. By virtue of its general powers, the corporation had the right to do what it did, except as it was prohibited by statute. (*Coats v. Donnell*, 95 N. Y. 168; 1 R. S. 603, tit. 4, § 4; Laws of 1890, chap. 564; Laws of 1892, chap. 688, § 48; *Varnum v. Hart*, 119 N. Y. 101.)

PECKHAM, J. The plaintiff is the receiver of the James Vick, Seedsman, Company. The defendant was a creditor of that company and the debt was due in March, 1891. He was unable to obtain payment in cash, and he took notes, which, when due, were not paid in full, and renewal was made, and on the 10th of September, 1891, the defendant held notes to the amount of \$7,000, not yet due, representing that amount of the indebtedness of the company due to the defendant in the March preceding. The company also owed the defendant on that day over \$3,000 on a current account then due. The defendant on that day also loaned the company \$500 to pay its employees. Defendant at the same time gave up the old

N. Y. Rep.] Opinion of the Court, per PECKHAM, J.

notes and took eleven others of \$1,000 each, except one which was \$976.19, all being dated on the 1st of September, 1891, and payable on demand.

The treasurer of the company and the defendant on this 10th Sept. believed the company had assets more than sufficient to pay its debts, although such turned out subsequently not to be the fact, while each knew at that time that the company was not able to pay its debts as they matured, and that it was in that sense insolvent.

These several notes of \$1,000 each were thus given to defendant so that he might have suit commenced upon each of them forthwith in the Municipal Court of Rochester, in which a judgment could be obtained by default in six days, and which court had no jurisdiction to render judgment in any one action for the full amount of the indebtedness of the company to defendant. Accordingly suit was commenced and judgment by default obtained in each case, and this action is brought to have each of such judgments set aside as illegal and void because contrary to the provisions of section 48 of the Stock Corporation Act. (Laws of 1890, chap. 564, p. 1075.) That section reads as follows:

"No corporation which shall have refused to pay any of its notes or other obligations when due, in lawful money of the United States, nor any of its officers or directors, shall assign any of its property to any of its officers, directors or stockholders, directly or indirectly, for the payment of any debt; and no officer, director or stockholder thereof shall make any transfer or assignment of its property or any stock therein to any person in contemplation of its insolvency; and every such transfer or assignment to such officer, director or other person or in trust for them or for their benefit shall be void."

The defendant was neither a stockholder nor officer of the corporation and his liability to respond to the plaintiff in this action rests upon the last clause of the above-quoted section.

The meaning of this section was under investigation in this court in the late case of *Varnum v. Hart* (119 N. Y. 101). In that case one of the directors of the corporation upon whom

the summons and complaint of the creditor were served, acting in concert with the creditor, knowing the company to be insolvent and meaning to permit the creditor to obtain a preference in payment of his claims over other creditors, kept the fact of the service of the papers upon himself concealed from the other officers of the company, and a judgment by default was the result. We held the statute was not violated; that neither the creditor nor the director was under any statutory restraint and that there was no violation of the statute by the failure of the director to disclose the fact of the service of the papers on him whereby a debt really existing and honestly due obtained a preference. Neither the director who was served nor the other officers, if they had known of the service of papers, were bound to interpose a defense and whatever was done or authorized to be done or omitted, the fact remained there was no assignment or transfer of property, and hence no violation of the statute.

The fact was also alluded to in that case that where the legislature had undoubtedly intended to prevent a preference by the recovery of a judgment, that prohibition was inserted in terms in the statute, and that such was the case in regard to moneyed corporations (Laws of 1882, ch. 409, sec. 187, p. 655), and also in regard to limited partnerships (1 R. S. 766, sec. 20), and the National Bankrupt Act by its express language. We see no occasion to take back or explain our language in the *Varnum* case.

Merely permitting a creditor to obtain a judgment in the regular course of legal proceedings is not on the part of the officers of the corporation a transfer or assignment of the property of the corporation within the meaning of the statute quoted. And the conduct of the treasurer in giving notes which might be sued by the defendant in the Municipal Court, did not so far alter the facts as to call for a different decision from that made in the *Varnum* case.

The case of *Throop v. Hatch, etc., Co.* (125 N. Y. 530) was decided upon the first portion of the statute relative to the company or officer thereof assigning or transferring any

N. Y. Rep.] Dissenting opinion, per BARTLETT, J.

of its property, directly or indirectly, to any officer or stockholder of the company. We thought there was a difference in the two cases and that an officer of an insolvent company could not obtain an indirect transfer through means of an attachment of the property of the company. The statute has now been changed so that it is no longer permissible to suffer a judgment to be recovered against a corporation of this kind. (Laws of 1892, ch. 688, sec. 48, page 1838.) Remembering the fact that it is only by a statutory prohibition that a transfer of property in order to prefer an honest debt due from an insolvent corporation is made illegal (*Coats v. Donnell*, 94 N. Y. 168) and bearing in mind the difference between those statutes which in terms prohibit the company from suffering the recovery of a judgment and this one, we are unable to say the corporation violated the statute, and we must, therefore, affirm this judgment, with costs.

BARTLETT, J. (dissenting). If this insolvent corporation had only suffered the defendant to recover judgments against it on notes which were due, there would, doubtless, be no violation of the statute.

It was found, however, by the trial court that on the 10th of September, 1891, the defendant held four notes of the corporation aggregating \$7,000, none of which was then due; that a balance of indebtedness, amounting to \$3,976.19, remained in open account; that defendant had previously advanced to the corporation in cash \$500; that upon the suggestion of the treasurer of the corporation, and with knowledge of its insolvency, the defendant surrendered the four undue notes and received for the indebtedness due and not due eleven notes due on demand, ten of one thousand dollars each and one for a less amount; that the notes were so made to enable the defendant to bring actions upon them in the Municipal Court of the city of Rochester at once; judgments were recovered on the notes and executions issued thereon September 17th, 1891, and the next day the corporation was placed in the hands of a receiver.

Under these peculiar circumstances, and in view of the active participation by the treasurer of the corporation in this transaction changing the legal *status*, it seems clear that the result accomplished was a transfer of the property of the corporation by one of its officers, in contemplation of insolvency, to the defendant thereby securing to him a preference which the statute forbids.

I think the judgment should be modified so as to set aside seven judgments representing the indebtedness that was not due of \$7,000, and, as modified, affirmed, with costs to the plaintiff.

All concur, with PECKHAM, J., for affirmance, except BARTLETT, J., who reads for modification of judgment, and HAIGHT, J., not sitting.

Judgment affirmed.

CHARLES JONES, Appellant, v. ORIN S. BACON, as Surviving Executor, etc., Respondent.

An oral promise by one person to indemnify another for becoming a guarantor for a third is not within the Statute of Frauds, and need not be in writing, and the assumption of the responsibility is a sufficient consideration for the promise.

In an action upon an alleged oral promise made by McK., defendant's testator, to indemnify plaintiff if he would indorse a note for K., which plaintiff thereupon did, to prove the promise, plaintiff called K. as a witness, and, in order to make him competent, executed to him a release from all liability because of said indorsement. *Held*, that by the release McK. was discharged from all liability to plaintiff, as on restoring to the latter the sum paid by him in discharge of his liability as indorser, McK. would have been entitled to the right which plaintiff had against K., and this was cut off by the release.

Reported below, 72 Hun, 506.

(Argued March 14, 1895; decided April 9, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 3, 1893, which denied a motion for a

new trial and ordered judgment in favor of defendant entered upon an order non-suiting plaintiff.

This action was brought to recover damages for a breach of an oral contract alleged to have been made by James McKechnie, defendant's testator, to indemnify him in case of his indorsement of certain notes made by one Kingsbury.

Upon the trial plaintiff called Kingsbury as a witness to prove the alleged promise. His testimony on that subject was objected to by defendant's counsel on the ground that the witness was incompetent to testify in regard thereto under section 829 of the Code of Civil Procedure. Plaintiff thereupon produced and proved and gave in evidence an instrument executed by plaintiff under seal, by the terms of which, in consideration of the sum of one dollar, he released Kingsbury from "all liability, responsibility or damages" sustained or which might thereafter be sustained by him by reason of his indorsement. This release was by an amended answer set up as a defense.

The further material facts are stated in the opinion.

William H. Smith for appellant. The non-suit was improperly granted. (*Leonard v. Vredenburg*, 8 Johns. 29; *Brown v. Curtiss*, 2 N. Y. 225; *Mallory v. Gillett*, 21 id. 412; *Ackley v. Parmenter*, 98 id. 425; *Tighe v. Morrison*, 116 id. 263; *Wildes v. Dudlow*, 11 Eng. Rep. 788; *F. N. Bank v. Chalmers*, 144 N. Y. 432; *Vogel v. Melms*, 31 Wis. 306; *Shook v. Van Mater*, 22 id. 534.) If the contract is not within the statute, then the release is no defense to this action, because the contract shifts the actual indebtedness to James McKechnie, the promisor, so that he is bound to pay the debt as his own, the original debtor Kingsbury standing to him in the relation of surety. (*Kingsley v. Balcome*, 4 Barb. 138; 62 Hun, 125; 144 N. Y. 432; *Gifford v. Corrigan*, 117 id. 257.)

Henry M. Field for respondent. The motion for a non-suit was properly granted. The alleged promises made by

the decedent, James McKechnie, to the appellant were each within the Statute of Frauds. (*Goodman v. Cohen*, 132 N. Y. 209; *Duffy v. Wunsch*, 42 id. 243; *Prims v. Koehler*, 77 id. 91; *Ackley v. Parmenter*, 98 id. 425; *Barnett v. Wing*, 41 N. Y. S. R. 799; *Browne v. Weber*, 38 N. Y. 187; *White v. Rintoul*, 108 id. 222.) Jones never became liable on that note at all, and, so far as he was concerned, the note was paid and canceled. (*Barnett v. Wing*, 41 N. Y. S. R. 799.) There was no consideration whatever for either promise, and none was shown. (*Ackley v. Parmenter*, 98 N. Y. 425; *Dunckel v. Dunckel*, 56 Hun, 25.) The release given by appellant to Sherman Kingsbury, the original debtor, discharged all parties who were in any way liable for or bound to pay the promissory notes. (Daniels on Neg. Inst. [3d ed.] § 1290; *Rowley v. Stoddard*, 7 Johns. 207; *King v. Baldwin*, 17 id. 384; *Mothram v. Mills*, 2 Sandf. 189; *Nicholson v. Revel*, 4 Ad. & El. 675; *Hayes v. Ward*, 4 Johns. Ch. 130; *Lewis v. Palmer*, 28 N. Y. 271.) The appellant has sustained no damages whatever. (*Ridgway v. Grace*, 50 N. Y. S. R. 326.)

Frank Rice for respondent. The agreements were without consideration, and, therefore, void. (*Barnett v. Wing*, 62 Hun, 125; *Edwards on Bills & Notes*, 218; *Hubbard v. Gurney*, 64 N. Y. 457.) The promises were within the Statute of Frauds and void because not in writing and subscribed by the defendant. (2 R. S. 135, § 2; 4 id. [8th ed.] 2590, § 2; *Leonard v. Vredenburg*, 8 Johns. 29; *Chapin v. Merrill*, 4 Wend. 657; *Barry v. Ransom*, 12 N. Y. 462; *Sanders v. Gillespie*, 59 id. 250; *Mallory v. Gillett*, 21 id. 412; *Tighe v. Morrison*, 116 id. 263; *Kingsley v. Balcome*, 4 Barb. 131; *Baker v. Dillman*, 21 How. Pr. 444; *Barnett v. Wing*, 62 Hun, 125; *Carville v. Crane*, 5 Hill, 483; *Staats v. Howlett*, 4 Den. 559; *Nugent v. Wolfe*, 111 Penn. St. 471; *May v. Williams*, 61 Miss. 125; *Eastèr v. White*, 12 Ohio St. 219; *Kelsey v. Hibbs*, 13 id. 340; *Ferrell v. Maxwell*, 28 id. 383; *Brand v. Whelan*, 18 Ill. App. 186; *Waterman v. Rossiter*, 45 id. 155; *Bissig v. Britton*, 59 Mo. 204; *Brown*

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v. *Adams*, 1 Stew. [Ala.] 51; *Martin v. Black*, 20 Ala. 309; *Draughan v. Bunting*, 9 Ired. [N. C.] 10; *Simpson v. Nance*, 1 Speer [S. C.], 4; *Macy v. Childress*, 21 Tenn. Ch. 438; Brown on Stat. of Frauds, §§ 158-161, 197; 1 Reed on Stat. of Frauds, § 144.) The release by Jones to Kingsbury discharged the estate of James McKechnie. (Edwards on Bills & Notes, *218; *Newcomb v. Raynor*, 21 Wend. 107; *F. Bank v. Blair*, 44 Barb. 641; *Grow v. Garlock*, 97 N. Y. 81; *Coonley v. Wood*, 36 Hun, 559; *Barnett v. Wing*, 62 id. 125, 131; *Brown v. Williams*, 4 Wend. 360; *Lynch v. Reynolds*, 16 Johns. 40; *Matthews v. Aiken*, 1 N. Y. 595; *Wilkes v. Harper*, 2 Barb. Ch. 338; *Cole v. Malcolm*, 66 N. Y. 363.)

ANDREWS, Ch. J. The oral promise of the defendant's testator to the plaintiff was, in substance, a promise of indemnity in case the plaintiff would become indorser on the note of Kingsbury to the banking firm of McKechnie & Co. for a debt of Kingsbury to the bank. The plaintiff thereupon indorsed the note of Kingsbury to the bank, and has been compelled to pay thereon the sum of about \$16,000, Kingsbury having made default and being insolvent. This is a statement of the facts in the simplest form, and the question arises whether the oral promise by the defendant's testator to indemnify the plaintiff was void under the Statute of Frauds, as being a promise to "answer for the debt, default or miscarriage of another person." (2 Rev. St. 135, sec. 2, sub. 2.) This is no longer an open question in this state. It was decided in *Chapin v. Merrill* (4 Wend. 657) that a promise by one person to indemnify another for becoming a guaranty for a third is not within the statute and need not be in writing, and that the assumption of the responsibility was a sufficient consideration for the promise. The doctrine of *Chapin v. Merrill* was approved in *Mallory v. Gillett* (21 N. Y. 412), in *Sanders v. Gillespie* (59 id. 250), and *Tighe v. Morrison* (116 id. 268), and in other cases in this court. The same doctrine now prevails in the English courts. (*Thomas v. Cook*, 8

Barn. & C. 728; *Reader v. Kingham*, 13 Com. Bench, N. S. 344; *Wildes v. Dudlow*, L. R., 19 Eq. Cas. 198.) We do not deem it proper to re-open the discussion or to refer to cases where a different view has prevailed. The court below considered the subject at large, and the able opinion of BRADLEY, J., refers to many of the cases on the subject.

The plaintiff was, therefore, entitled to maintain an action except for his act in releasing Kingsbury from his liability for the money he was compelled to pay on account of the indorsement. The release was probably essential in order to enable the plaintiff to make any proof of the agreement for indemnity, since he could establish the promise only by Kingsbury, the plaintiff himself not being a competent witness by reason of the death of the promisor McKechnie, and there being no other person cognizant of the transaction. By the release Kingsbury was discharged from all responsibility to the plaintiff. The plaintiff having paid the debt in part out of his property, could, prior to the release, have maintained an action against Kingsbury to recover the sum so paid. (*Butler v. Wright*, 20 Jo. 367; *Hunt v. Amidon*, 4 Hill, 345.) The indemnitor of the plaintiff, on restoring to him this sum in performance of the contract of indemnity, would be entitled to be substituted to the claim of the plaintiff against Kingsbury. This stands upon the most obvious principles of natural justice. The money paid by the plaintiff was at the request of Kingsbury, implied from the legal liability as indorser assumed by him, and Kingsbury was bound to reimburse the plaintiff. But, by an independent contract between the plaintiff and his indemnitor, McKechnie, the latter was also bound to save the plaintiff harmless. On performance of this obligation by the indemnitor, he would be entitled to stand in the shoes of the plaintiff as to his right to call upon Kingsbury. By equitable substitution the indemnitor would take the right which the plaintiff had against Kingsbury. There was no privity of contract between the indemnitor and Kingsbury, but there was between the plaintiff and Kingsbury. On paying the plaintiff what he had been compelled to pay for Kingsbury,

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pursuant to the contract of indemnity, the indemnitor would stand as the equitable assignee of the plaintiff of the obligation of Kingsbury to him. Kingsbury had no equity to be relieved from his obligation, because the plaintiff had recourse against McKechnie. The plaintiff, though not strictly such, had the equities of a surety against Kingsbury, and the equities by operation of law would pass to McKechnie on his performing his contract of indemnity, except for the release. The release of Kingsbury by the plaintiff materially changed the rights and remedies of the defendant against Kingsbury. It barred any claim against Kingsbury in behalf of the estate of the indemnitor, to recover as the representative of the rights of the plaintiff against him, in case the plaintiff should prevail in the action. Such an interference plainly operates to discharge the estate of the indemnitor.

Upon the ground that the release defeated the right of action, the judgment should be affirmed.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
BENTON TURNER, Appellant.

In an action of replevin, brought in the name of the People by the forest commission, to recover logs cut by defendant upon lands included in what is known as the "forest preserve of the state of New York," plaintiff claimed title through a conveyance to the state by the comptroller, who had purchased the lands at tax sales made for unpaid taxes for the years 1866 to 1870 inclusive; this conveyance was executed after the two years allowed for redemption had expired; the deed to the state was recorded three years before the passage of the act of 1885 (Chap. 448, Laws of 1885), which provides that all conveyances theretofore executed by the comptroller, "after having been recorded for two years, * * * shall, six months after this act takes effect, be conclusive evidence that the sale and all proceedings prior thereto * * * were regular." This action was brought after the expiration of the six months. Defendant claimed that the tax sale was illegal and void for the reason that the unpaid tax for 1867 was based on an assessment roll verified before the third Tuesday of August, and that in 1870 the

145	451
151	548
145	451
152	58
145	451
s 155	626
145	451
162	378
162	379
162	380

assessors omitted to meet on the third Tuesday of August. *Held*, that these were not jurisdictional defects, but simply irregularities in the proceedings; that conceding the irregularities to have been such as to render the sale invalid, the owner had his remedy and an opportunity to be heard, by appeal to the board of supervisors, and also by appearance before the comptroller and demand for the cancellation of the tax; and that after the expiration of the six months the defects were cured by the statute.

People v. Turner (117 N. Y. 227), limited.

Also, *held*, that through the comptroller's purchase and deed the state was constructively in possession, and this constructive possession was made an actual possession by the powers and duties devolved upon the forest commission as its representative by said act of 1885.

Defendant claimed an actual occupancy of part of the lands sold, and that as no notice to redeem was served on the occupant no title was acquired under the sale. It appeared that the land was wild, uncultivated and unimproved forest land, with a small natural meadow thereon, upon which one M., by leave of the owner, at some time after 1871, entered, cut and hauled away grass; also, that on two occasions M. scattered a little grass seed thereon and at times dammed up a brook so as to overflow about half an acre. There was no building on the land and it was uninclosed. *Held*, that the proof failed to establish any such actual occupancy as called for a compliance with the statutory provision requiring service upon the occupant of notice to redeem.

(Argued March 13, 1895; decided April 9, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 8, 1894, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

Frank E. Smith for appellant. The tax sale of 1877 was illegal and void when it was made. (Black. on Tax Titles [5th ed.], § 522; *People v. Hagadorn*, 104 N. Y. 516, 523; *Westfall v. Preston*, 49 id. 349; *Jewell v. Van Steenburgh*, 58 id. 85; *Bradley v. Ward*, Id. 401, 406; *Thompson v. Burhans*, 61 id. 52, 65; *People v. Suffern*, 68 id. 321, 326; *Brovoort v. City of Brooklyn*, 89 id. 128, 132; *Shattuck v. Bascom*, 105 id. 39, 45; *People v. Turner*, 117 id. 227, 235;

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Sharp v. Johnson, 4 Hill, 92; *Van Rensselaer v. Witbeck*, 7 N. Y. 517; *Lockwood v. Gehlert*, 127 id. 241; *May v. Traphagen*, 139 id. 478; *Sanders v. Downs*, 141 id. 422.) The sale of 1877 remains void, notwithstanding chapter 448 of the Laws of 1885. (*Cromwell v. MacLean*, 123 N. Y. 474, 489-494; *Denny v. Mattoon*, 2 Allen, 361, 382, 383; *Forster v. Forster*, 129 Mass. 559; *Orton v. Noonan*, 23 Wis. 102; *Baker v. Oakwood*, 123 N. Y. 16; *Quinlon v. Rogers*, 12 Mich. 168; *Groesbeck v. Seeley*, 13 id. 329; *Case v. Dean*, 16 id. 12; *Locke v. State*, 140 N. Y. 480; *U. S. v. Lee*, 106 U. S. 196; *T. & G. R. R. Co. v. Comm.*, 127 Mass. 43; *Parmenter v. State*, 135 N. Y. 154, 163; *Baxter v. State*, 10 Wis. 454; *Stanley v. Schwalby*, 147 U. S. 508; *S. F. S. Union v. Irwin*, 28 Fed. Rep. 708, 715; *People ex rel. v. Chapin*, 104 N. Y. 369; *Ostrander v. Darling*, 127 id. 70; *People ex rel. v. Wemple*, 139 id. 240; *People ex rel. v. Roberts*, 144 id. 234; *U. S. v. Jones*, 134 U. S. 1; *U. S. v. Alire*, 6 Wall. 573.) Actual occupancy of part of the lot was proven, and, as notice was not served on the occupant, no title was acquired under the 1877 sale. (*Bush v. Davison*, 16 Wend. 550; *People ex rel. v. Wemple*, 144 N. Y. 478; *Cook v. Rider*, 16 Pick. 186; *Lord Advocate v. Young*, L. R. [12 App. Cas.] 544; *Harper v. Charlesworth*, 4 B. & C. 574; *Tredwell v. Reddick*, 1 Ired. Law, 56; *Williams v. Buchanan*, Id. 535; *Simpson v. Blount*, 3 Dev. Law, 34; *Thornton v. Foss*, 26 Maine, 402; *Thacher v. Cobb*, 5 Pick. 423; *Hubbard v. Kiddo*, 87 Ill. 578; *Comstock v. Beardsley*, 15 Wend. 348.)

Albert Hessberg for respondent. The decision of this court in the case of *People v. Turner* (117 N. Y. 227) is a sufficient authority for the affirmance of the judgment under review, not only being between the same parties, but the facts shown in that case being substantially the same as those defendant claims to have established in this case. (*Ostrander v. Darling*, 127 N. Y. 78; *Cromwell v. MacLean*, 123 id. 474, 490; *Joslyn v. Rockwell*, 128 id. 334, 339; *Moore v. City of Albany*, 98 id. 396; *Chase v. Chase*, 95 id. 373.)

The defendant was not the original owner, nor did he have any interest in the premises at the time of the commencement of this action, as entitles him to assert the invalidity of the deed to plaintiff. (Laws of 1886, chap. 280.) The evidence and testimony and records offered in evidence by defendant were not sufficient to establish the irregularities alleged in the tax proceedings. (*People ex rel. v. Comr. of Taxes*, 99 N. Y. 254; *People ex rel. v. Adams*, 125 id. 471-484; *In re Winegard*, 78 Hun, 52, 60; *People v. Turner*, 117 N. Y. 238; *Coleman v. Shattuck*, 62 id. 358; *Lott v. De Graw*, 30 Hun, 417; *Chamberlain v. Taylor*, 36 id. 24; *Bradley v. Ward*, 58 N. Y. 401.) The defendant failed to show actual occupancy of any part of the lot, and, hence, there was no obligation on the plaintiff to serve a notice to redeem on any one. (*People ex rel. v. Wemple*, 144 N. Y. 478; *Miller v. R. R. Co.*, 71 id. 380; *Price v. Brown*, 101 id. 669; *Cleveland v. Crawford*, 7 Hun, 616; *Lane v. Gould*, 10 Barb. 254; *Wheeler v. Spinola*, 54 N. Y. 377; *Stewart v. Chrysler*, 100 id. 378.) The irregularities alleged to exist were cured by chapter 448 of the Laws of 1885. (*People v. Turner*, 117 N. Y. 227; *Ensign v. Barse*, 107 id. 329; *Chamberlain v. Taylor*, 26 Hun, 24; *Van Deventer v. Long Island City*, 139 N. Y. 133; *Terrel v. Wheeler*, 123 id. 76; *Duanesburgh v. Jenkins*, 57 id. 177; *Williams v. Suprs.*, 122 U. S. 154.) The defendant was not without a remedy, if entitled to any, during the six months allowed by chapter 448 of the Laws of 1885, within which he might institute an action or proceeding to vacate the tax sale or the conveyance made thereunder. (*People ex rel. v. Chapin*, 104 N. Y. 469; *Ostrander v. Darling*, 127 id. 70; *People ex rel. v. Wemple*, 139 id. 240; *People ex rel. v. Roberts*, 144 id. 234; Laws of 1883, chap. 13; Laws of 1885, chap. 448; *People ex rel. v. Briggs*, 50 N. Y. 553; *In re G. E. R. Co.*, 70 id. 367; *People ex rel. v. Durston*, 119 id. 569; *Rumsey v. City of Buffalo*, 97 N. Y. 114; *T. G. Sem. v. Cramer*, 98 id. 121; *Stewart v. Chrysler*, 100 id. 378; *King v. Townsend*, 141 id. 362; *Sanders v. Downs*, 141 id. 422;

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Opinion of the Court, per GRAY, J.

Scott v. Onderdonk, 14 id. 9; *Marsh v. City of Brooklyn*, 59 id. 280; *Dederer v. Voorhies*, 81 id. 156; *Clementi v. Jackson*, 92 id. 591; *People ex rel. v. Cady*, 18 J. & S. 399; *People ex rel. v. Brinkerhoff*, 20 Wkly. Dig. 391; *Board of Liquidation v. McComb*, 92 U. S. 531-541.)

GRAY, J. The appellant in this case is the same person, whose appeal was recently under review by us. (117 N. Y. 227.) The decision there made must be regarded as operative in the present appeal. In the former case the action was to recover penalties for cutting trees upon certain lands in Franklin county, in this state; while in this case the action is one of replevin to recover logs taken by the defendant from other lands in that county. The facts, affecting the defendant's position towards the lands, differ in the two cases, in this; that in the earlier case the defendant was not in possession and showed no title to the lands and was, therefore, a trespasser; while in the present case he claims to have acquired the title and to have been in possession. Although we might safely rest the determination of this appeal upon the decision rendered in the previous case, where the question was treated as though the defendant had a right, as an owner of the property, to rebut the plaintiff's proof of title, I will, nevertheless, state, briefly, the reasons for affirming this judgment.

The facts respecting the acquisition of title by the defendant are these, viz.: that the defendant received in 1886 a deed from one Riley, who, in the same year, had acquired an interest in the lands by a conveyance from six of the eight children of one Norton. Norton had acquired the lands in 1872 from the Barnards, who appear to have held the same by tax title. Norton died in 1882 and, subsequently to his death, the conveyance to Riley was made by six of his children, which I mentioned. The plaintiff's title to the lands was acquired through a conveyance by the comptroller to the state, October 12th, 1877. He had purchased the same at tax sales, made for the unpaid taxes of the years 1866 to 1870, inclusive. His deed was made June 9th, 1881, and was recorded June 8th,

1882. The two years allowed for redemption had expired October 12th, 1879. Three years after the record of the People's deed, chapter 448 of the Laws of 1885 was enacted. That act provided that, "All conveyances that have been heretofore executed by the comptroller * * * after having been recorded for two years in the office of the clerk of the county, in which the lands conveyed thereby are located, * * * shall, six months after this act takes effect, be conclusive evidence that the sale and all proceedings prior thereto * * * were regular." The section further provided that, "All such conveyances and certificates, and the taxes and tax sales on which they are based, shall be subject to cancellation, as now provided by law, on a direct application to the comptroller or an action brought before a competent court therefor, by reason of the legal payment of such taxes, or by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid." The lands in question are within what is known as the "Forest Preserve of the State of New York;" and the second section of the act of 1885 makes its provisions applicable to those counties which include the Forest Preserve. The six months mentioned in the act, within which tax sales and proceedings might be open to question after the act went into effect, expired December 9th, 1885. The forest commission had been established in May, 1885, and, by the act creating that commission, it was given the care, custody, control and superintendence of the Forest Preserve. A warden was employed by the forest commission, who discovered the cutting of the timber by the defendant, and this action was then brought, in behalf of the People, by the forest commission.

Referring now to the points taken by the appellant, in objection to the right of the People to maintain their action against him, he claims that the tax sale of 1877 was illegal and void; for the reasons that the tax for the year 1867 was based on an assessment roll verified before the third Tuesday of August and, as to the tax for the year 1870, that the tax assessors had omitted to meet on the third Tuesday of August,

as required by law. He further claims that these were jurisdictional defects, which the act of 1885 could not cure, and he also asserts the unconstitutionality of the act. As to the first objection, relating to the proceedings of the tax assessors, I would observe, in the first place, that they were not jurisdictional defects, in any proper sense. They were irregularities in the proceedings for the assessment of the tax. Some confusion of thought may be occasioned by the unguarded language of Chief Judge RUGER in *People v. Turner* (117 N. Y. 227), who speaks of the irregular proceedings by the assessors as jurisdictional defects. But it is very clear that he did not intend the full force of that expression and that he used those words in the sense in which they were used by Judge FINCH in *Ensign v. Barse* (107 N. Y. 329). In the latter case it was held that those defects, only, which went to the jurisdiction and authority of the assessors were not cured by the act of 1882. The defect there considered was the defective date of the assessors' certificate and that was deemed to be in the nature of an irregularity, merely. In *Joslyn v. Rockwell* (128 N. Y. 338), it was held that the act of 1885, now in question, did not differ, in any material respect, from the act of 1882, which was discussed in *Ensign v. Barse*. The defects, which the appellant here points out in the proceedings of the tax assessors, are not unlike, in their effect, to those which were relied upon in his former case. There they consisted of the alleged omission by the assessors to give notice of a review of the assessments in the years referred to, or to hold a meeting for such purpose, as required by the statute, and in closing and verifying the assessments prior to the time provided by law. Those irregularities of the assessors were considered by Judge RUGER in connection with the effect to be given to the comptroller's deed, after a certain lapse of time, under the act of 1885. It was held that the act, in its principal aspect, was one of limitation and that, as such, it was within the constitutional power of the legislature to enact as affecting future cases and, as well, existing rights. The appellant concedes that under that decision the

act of 1885 must be regarded as a statute of limitation; but he, nevertheless, insists upon a distinction in the facts between the two cases. He claims here to stand in the shoes of Norton, who was the owner of the lands at the time of the tax sale and of the passage of the act of 1885. As I apprehend his proposition, it is about this, viz.: that while the act is operative in cases where the purchaser at a tax sale is in actual possession, it is invalid as against the owner of the lands who, at the time of the sale and of the passage of the act was, and remained, in possession, actual or constructive. By a process of ingenious reasoning upon the theory of statutes of limitations, the appellant undertakes to show that the theory is inapplicable to the case of the owner in possession; to whom there does not, merely by reason of the tax sale, accrue any cause of action either to obtain title or possession, or to cancel the sale as a cloud upon title. The argument is that the sale was void and that the owner could rest upon its invalidity and defend himself whenever attacked. All that the appellant says, however, is practically an argument upon our previous decision and to obviate its effect. In the other case, while it was doubted whether a stranger, not in possession or claiming title and, therefore, not aggrieved, could raise the question of the invalidity of the act of 1885, in its operative effect upon the property of another, the opinion proceeded upon the assumption that the defendant had the right to rebut the plaintiff's proof of title and took up the question whether the owner of the property had been deprived of it without due process of law and an opportunity of being heard. That question enters the case in this way, namely, that the opportunity for the appellant to be heard before the assessors, at a meeting to be held, as provided by law, on the third Tuesday of August, was taken away from him by the fault of the assessors. In the other case, it was said, that the argument that a lawful exercise of the taxing power by the legislature requires that an opportunity to be heard before the taxing officers, in respect to the imposition of a tax, should be afforded to the taxpayer, or otherwise, he

is deprived of his day in court, fails if it can be shown that he was not actually, or substantially, deprived of that opportunity. Upon an examination of the statute under which the tax was levied, we thought that the taxpayer was not deprived of such notice and opportunity to be heard as the nature of the case required. We thought that, while the act gave the taxpayer the right to appear before the assessors at the time stated, in order to persuade them to modify, or vacate, his assessment, he still had, under the law, the right, in case of a neglect of the assessors to meet, of appeal to the board of supervisors at their next annual meeting; they having power to review and correct the assessment. "Ample opportunity is thereby given the taxpayer, if he feels aggrieved in respect to assessments of his property, to be heard before the board of supervisors, who are vested with full power to afford all and any relief which was possessed by the assessors." The opinion was there expressed that, "the opportunity afforded the taxpayer, to appear before the board of supervisors and challenge the legality and fairness of his assessment, was a satisfaction of his rights in respect to a hearing on the subject. It would have been competent for the legislature, while authorizing the imposition of taxes, to have omitted altogether the provisions requiring notice and a meeting by the assessors to review assessments, and to have provided only for a hearing before the supervisors in the first instance. * * * So long as the taxpayer is given the equivalent, therefore, the legislature has done all that is required of it under any view of the taxpayer's constitutional rights." The opinion then proceeds as follows: "But more than this. After the tax has been returned to the comptroller, the taxpayer has still the right, both before and after the sale of his property, to appear before that officer and make proof of any illegality in the tax levy, and demand that such tax, and any sale made thereon, shall be canceled by him. (Citing the statutes.) And finally the act of 1885 itself provides for the exercise of the right of the comptroller to cancel taxes and sales illegally made, where the taxes have been legally paid, or where the town or ward

had no legal right to assess the land. These rights were not only open to the taxpayer to exercise at any time previous to the act of 1885; but the right of all persons to exercise them was also preserved in all cases for six months after the passage of that act. * * * It would seem that the right of a property owner to assert his title to property claimed by him, after such ample opportunities to protect such right had been afforded, could be regulated by a law of limitation without incurring the objection that his property had been taken without due process of law." The authoritative expressions, in the opinion referred to, are applicable to the present case. Conceding the irregularity in the assessment proceedings to have been such as rendered the sale invalid, nevertheless, the assessors had the jurisdiction and authority to assess and if they erred in their proceedings, and neglected to take the steps which the statute required, there was, in the first place, the remedy of an appeal to the board of supervisors; and, in the second place, there was the opportunity to appear before the comptroller. By virtue of the act of 1885, that opportunity to appear before the comptroller and to demand the cancellation of the tax sale, because of irregularities in the proceedings leading to the sale, was continued for six months after the passage of the act. Differing from a case between the owner of lands and the purchaser thereof at the tax sale, where the comptroller would not have the power upon the application of the owner to cancel a tax title, here the state became the owner through the purchase and it was open to the owner to come before the comptroller and to make proof of the invalidity of the sale through which the state derived its title. With the knowledge of the law, the person claiming to be the owner of the land sold was chargeable; and when put upon his inquiry, as to the result of the proceedings, he discovered the state to have become the purchaser, it was incumbent upon him to take affirmative steps to cancel the sale, if he would recover his title to the lands. There may be considerable doubt with respect to the nature of the possession by Norton and of this appellant; but,

however that may be, the state was constructively in possession through the comptroller's purchase and deed. The effect was that the state had resumed its ownership of the land and its title thereto was assured, as the result of the proceedings, until invalidated by proof respecting the illegality of the proceedings leading to the tax sale. That title, by force of the provisions of the act of 1885, became unquestionable upon the expiration of the six months after it went into effect. While we think the People were not bound to take any steps towards actual possession, after the conveyance to them of the land, any doubt upon the subject would seem to be eliminated by virtue of the provisions of the act which created the forest commission and placed the Forest Preserve, within which are the lands in question, in the care, control and supervision of the commission. The constructive possession which the state had acquired, I think, was made an actual possession by the powers and duties devolved upon the forest commission as its representative.

The appellant raises a final point, that there was an actual occupancy of part of the lands proven and, as no notice was served on the occupant, no title was acquired under the sale of 1877. It would seem that that objection was one of those which should be taken upon an application to the comptroller by the owner, within the time allowed by the act of 1885 to complain of the invalidity of the sale. But the objection in any view is quite untenable. The finding of the referee was that the land was wild, uncultivated and unimproved forest land; with a small natural meadow of about ten acres, upon which, some time after the year 1870, by the leave of Norton, the then owner, one Moody, entered and cut and hauled away grass. Upon two occasions he had scattered a little grass seed and at times he had dammed up the brook, so as to overflow about half an acre. There was no residence, nor building upon the land, nor any cultivation or inclosure thereof, as was the case in *People ex rel. Chase v. Wemple* (144 N. Y. 478). We think the proof fell far short of establishing any such actual occupancy of the lands by any person, as called for a compli-

ance with the provision of the law that a written notice to redeem must be served on the occupant.

I do not think it necessary to consider, at further length, the questions argued by the appellant. Enough has been said, in connection with our previous decision in this appellant's other case, to show that the judgment recovered by the People in this case was correct and should be affirmed, with costs.

All concur.

Judgment affirmed. _____

RANDOLPH F. PURDY, Respondent, v. AGNES LYNCH, as Executrix, etc., et al., Appellants.

While a trustee is to be held to the most rigid accountability for the performance of all his duties as such, the true question in any case, where he is charged with negligence, is as to whether, considering all the facts and circumstances, he employed in the matter complained of such prudence and diligence in the discharge of his duties as in general, men of average prudence and discretion would employ in their own affairs, and in determining this, the facts as they existed at the time are to be considered, without regard to those which subsequently took place, by reason of which a loss occurred.

R., who had been one of the managing officers of a savings bank which became insolvent, in order to secure the depositors in the bank, executed to three trustees, D., L. & Q., a conveyance of certain real estate; they to sell the same and with the proceeds pay the depositors, who would execute to R. subrogations of their rights against the bank, so much of their deposits as were not paid by the receiver of the bank. It was understood that Q. was to be and he was appointed receiver. Q. was a well-known business man of high character and financial ability; he was well known to R., and acceptable to him both as trustee and receiver. In an action brought against the trustees for an accounting these facts appeared: A large sum was received from the sale of the real estate and from rents thereof, all of which went into the hands of Q., who paid out the whole thereof in the execution of the trust, save a balance of \$32,962.96, which was unaccounted for; of the proceeds of the sales over \$17,000 came into Q.'s hands directly, and were never in the possession or under the control of the other trustees. The trustees appointed an agent to collect the rents, who collected over \$18,000, which he paid over to Q. Held, that for these sums D. & L. were not liable, and as they amounted to more than the deficit, there was nothing for which they could be held liable.

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There were a large number of depositors, all of whose claims were due.

Most of the proceeds of sales were deposited by the trustees with a trust company, and subsequently from time to time were drawn out by them and transferred to Q. to enable him to at once pay the depositors, and take the subrogations as provided for in the trust deed. *Held*, that under the circumstances, and in the absence of any proof or claim that the transfers were made at times when there was no pretense of their being needed to pay depositors, D. & L. were not chargeable with such negligence in making the transfers as would make them liable for the failure of Q. to account for all the money that thus came into his possession; that they had the right to transfer at one time funds enough to answer all contingencies and more than enough for any one day or one week's payments.

Also, *held*, that the trustees, in the performance of their duties, had a right to appoint an agent to do some of their work, and were not precluded from appointing one of their number as such agent.

Purdy v. Lynch (72 Hun, 272), reversed.

(Argued March 15, 1895; decided April 9, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 11, 1893, which modified and affirmed as modified a judgment in favor of plaintiff entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles E. Miller for appellant. The creditors of the Guardian Savings Institution are necessary and proper parties to this action, so far at least as relates to the distribution of the trust property disposed of. (*Sherman v. Parish*, 53 N. Y. 490.) Lynch and Develin were not guilty of negligence. (*King v. Talbot*, 40 N. Y. 76; *McCabe v. Fowler*, 84 id. 314; *Clough v. Bond*, 3 M. & Cr. 497; *Story's Eq. Juris.* § 1272; *Williams on Exrs.* [6th ed.] 1922.) In their conduct Lynch and Develin acted with such prudence and diligence in the care and management of the trust estate as in general prudent men of discretion and intelligence would have employed in a similar matter and in the same manner in which they would have acted for themselves under similar circumstances and

according to the ordinary usages of business. The appointment of an agent was proper. (Lewin on Trusts, 254; Williams on Exrs. 1922-1930; Perry on Trusts, § 409; *Ivy v. Campbell*, 1 S. & L. 341; *Speight v. Gaunt*, 9 App. Cas. 1; *Chambers v. Minchin*, 7 Ves. 193; *Bacon v. Bacon*, 5 id. 331; *Davis v. Sterling*, 1 R. & E. 66.) The circumstances of this case justified, if they did not absolutely require, the employment of an agent to perform the merely clerical duty of paying the creditors of the Guardian Savings Institution and the intrusting to him of moneys to make such payments. (*Ex parte Griffin*, 1 G. & J. 114.) The prudence and propriety of the conduct of the trustees must be judged in the light of existing circumstances and not by the result. (*Crabb v. Young*, 92 N. Y. 56; *Lansing v. Lansing*, 1 Abb. Pr. [N. S.] 288.) Plaintiff acquiesced in the conduct of the trustees. (*Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Stuyvesant v. Hone*, 1 Sandf. Ch. 419; *Truscott v. King*, 6 Barb. 346; 2 Seld. 147; *Hall v. Nelson*, 23 Barb. 88.) The acquiescence of plaintiff in the course of conduct adopted by the trustees waived the necessity of any other course on their part and was *pro tanto* a modification of the provisions of the trust deed if such conduct were not in accordance with such provisions. (Bigelow on Estoppel, 663; *Johnson v. Oppenheim*, 55 N. Y. 280, 291; *Ins. Co. v. Norton*, 96 U. S. 234, 240; *E. C. S. Bank v. Root*, 48 N. Y. 292, 298; *Sherman v. Parish*, 53 id. 483, 492; *Butterfield v. Cowing*, 112 id. 486; *Brier v. Stokes*, 11 Ves. 319; Perry on Trusts, §§ 467, 850, 852, 870; Story's Eq. Juris. § 1284; Herman on Estoppel, 954, 1360; *Niven v. Belknap*, 2 Johns. 573.) A waiver may be established by parol evidence, or by the conduct of the parties. (Add. on Cont. § 324; *Prentice v. K. L. Ins. Co.*, 77 N. Y. 483; *Brink v. H. F. Ins. Co.*, 80 id. 108-112; *Ins. Co. v. Norton*, 96 U. S. 234) The court below erred in charging Lynch and Develin with the rents of real estate, amounting to \$18,746.25, received by Quinlan alone, and which never came into their hands. (Lewin on Trusts, 260; Perry on Trusts, §§ 334, 412, 415; *Bruen v. Gillett*, 115 N. Y. 10;

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Cocks v. Haviland, 124 id. 426; *Townley v. S. B. Co.*, 35 S. C. 312; *Littlescales v. Gascoyne*, 3 Bro. C. C. 73; *Riky v. Kennies*, 1 L. & Gt. Sugd. 122; *Williams v. Nixon*, 2 Beav. 472; *Gouldsworth v. Knight*, 11 M. & W. 387; *Ohio v. Guilford*, 18 Ohio, 500.) The courts below erred in refusing to allow commissions to Lynch and Develin on the balance of moneys received and paid out by them over and above the sum of \$183,530.18, upon which they had received commissions. (*Meacham v. Sterries*, 9 Paige, 398.)

David Thomson for respondent. The trustees Lynch and Develin became liable for the misapplication of the trust fund by their co-trustee Quinlan by reason of their careless and negligent performance of the duties of their trust. (Story's Eq. Juris. §§ 1267, 1275, 1278; *Oliver v. Court*, 8 Price, 127; *Schenck v. Schenck*, 1 C. E. G. 174; *Dix v. Burford*, 9 Beav. 409; *Egbert v. Butler*, 21 id. 560; *Booth v. Booth*, 1 id. 125; *Lincoln v. Wright*, 4 id. 427.) The transfer of the trust funds to Quinlan by his co-trustees rendered the trustees Lynch and Develin liable in law for the misapplication thereof. (*Sadler v. Hobbs*, 2 Brown's Ch. 114; *Cross v. Smith*, 7 East, 256; *Curtis v. Mason*, 12 L. J. [N. S.] 442; *Chambers v. Minchin*, 7 Ves. 186; *Keble v. Thompson*, 3 Brown's Ch. 112; *Doyle v. Blake*, 2 S. & L. 229; *Cowell v. Gatcombe*, 27 Beav. 568; *Mendes v. Guedella*, 2 J. & H. 259; *Walker v. Symonds*, 3 Swanst. 50; *Clough v. Bond*, 3 M. & C. 496; *Brumridge v. Brumridge*, 27 Beav. 5; *Hanbury v. Kirkland*, 3 Sim. 265; *Moses v. Levi*, 3 Y. & C. 359; *Adair v. Brimmer*, 74 N. Y. 531; *Croft v. Williams*, 88 id. 384; *Earle v. Earle*, 93 id. 104; *Wilmerding v. McKesson*, 103 id. 329; *In re Cornell*, 110 id. 351; *Bruen v. Gillet*, 115 id. 10; *In re Myers*, 131 id. 409; *State v. Guilford*, 15 Ohio St. 593; *Deadrick v. Cantrell*, 10 Yerg. 23; *Thomas v. Scruggs*, Id. 400; *McMurray v. Montgomery*, 2 Swanst. 374; *Maccubbin v. Cromwell*, 7 G. & J. 157; *Edmunds v. Crenshaw*, 14 Pet. 166; *Wallis v. Thornton*, 2 Brock. 434; *Sparhawk v. Buell*, 9 Vt. 41; *Clark's Appeal*,

6 Harris, 175 ; *Ducommun's Appeal*, 5 id. 268 ; *In re Evans*, 2 Ashmead, 478.) The trustees Lynch and Develin were also liable for the rents of the premises collected by the agent of the three trustees, and by him paid over to Quinlan. (Perry on Trusts, § 402.) The trustees Lynch and Develin were also liable for that portion of the fund derived from sales of real estate, which did not go through the account of the trustees in the United States Trust Company. (Hill on Trustees, § 312.) There was no reasonable necessity which required Lynch and Develin to turn over to their co-trustee Quinlan the bulk of the trust fund, and leave it to be dealt with by him at his sole pleasure, and their action in so doing cannot be justified either upon principle or upon the facts of the case. (Lewin on Trusts, 290 ; *Gill v. Atty.-Gen.*, Hardres, 314 ; *Booth v. Booth*, 1 Beav. 125 ; *Atty.-Gen. v. Gleg*, 1 Atk. 356 ; *Macklow v. Fuller*, Jacobs, 198 ; *Hengst's Appeal*, 24 Penn. St. 413 ; *Ducommun's Appeal*, 5 Harris, 268 ; *Hughlett v. Hughlett*, 5 Humph. 474.) There is no estoppel in favor of the trustees Lynch and Develin. (Pom. Eq. Juris., § 1883 ; *Rehden v. Wesley*, 29 Beav. 213 ; *Underwood v. Stevens*, 3 Meriv. 712 ; *Lincoln v. Wright*, 4 Beav. 427.) The trustees are not entitled to commissions. (*Cook v. Lowry*, 95 N. Y. 103 ; *Gordon v. Matthews*, 30 Md. 235 ; *Hermstead's Appeal*, 60 Penn. St. 423 ; *McKnight v. Walsh*, 24 N. J. Eq. 498 ; *Warbass v. Armstrong*, 10 id. 263 ; *Lathrop v. Smalley*, 23 id. 492 ; *Blauvelt v. Ackerman*, Id. 495 ; *Norris' Appeal*, 71 Penn. St. 106 ; *Stearby's Appeal*, 38 id. 525.)

PECKHAM, J. This action was brought to obtain an accounting from the defendants Quinlan, Lynch and Develin, as trustees under a deed of trust executed by Walter Roche to them in 1872. The action was commenced in 1875, and John T. McGowan, who subsequently died, was at that time plaintiff. The defendant John Develin died February 23, 1888, and the defendant James Lynch died August 5, 1888. The action was continued against the respective executors of the deceased defendants.

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The material facts in regard to the action are these: For some time prior to November 17, 1871, Walter Roche had been vice-president of the Guardian Savings Institution. The bank was doing business in the city of New York, and on the date mentioned it was insolvent. Mr. Roche had been one of the managing officers of the bank, and through his influence quite a number of individuals and institutions had become depositors therein, among them being the Foundling Asylum, which had a deposit of nearly \$100,000 on that day. Mr. Roche being desirous of securing, as far as possible, the depositors in the bank, went, in company with a friend, to the office of the defendant Develin for the purpose of consulting as to the course to be pursued. Upon such consultation it was decided that a receiver ought to be appointed at once for the savings bank, and it was the subject of discussion as to who should be chosen. Finally it was determined that Jeremiah Quinlan, a friend of Mr. Roche, should be the receiver, and then the question of Mr. Roche's individual action was discussed. Ultimately he decided to execute a trust deed to the defendants Develin, Lynch and Quinlan,* by which a large amount of real property owned by him was to be conveyed to the trustees, who were to sell the same and with the proceeds pay the depositors of the savings bank that proportion of their deposits which might be owing to them and which would not be paid by the receiver of the bank. Payments were only to be made to those who would execute subrogations to Mr. Roche of their rights against the bank to the extent of such payments, and they were to be executed by a time specified in the trust deed. Mr. Quinlan, the receiver and one of the trustees, was well known to Mr. Roche and was entirely acceptable to him, both as a receiver and as a trustee. He was a prominent business man of excellent character and considerable financial ability, residing and doing business in the city of New York. Mr. Lynch was also a resident of the city, engaged in business there, and a man of integrity and good business capacity. Mr. John E. Develin was a lawyer of high standing in his profession,

and he was also the general counsel and adviser for the Foundling Asylum. The trust deed conveyed to these trustees a large amount of real estate situated in the city of New York, and it was conveyed to them upon a trust to sell and convey the same, or so much as might be necessary, and with the proceeds pay the depositors of the bank as already stated. By the terms of the deed the time within which the payments were to be made was stated, but it was subsequently extended until sometime in October, 1874. This trust deed was not joined in by Mrs. Roche, and subsequently, and on the 24th day of January, 1872, the trustees re-conveyed the real estate mentioned in that November trust deed back to Roche and received at the same time another deed substantially the same as the November deed, in the execution of which Mrs. Roche joined.

The present plaintiff, Randolph F. Purdy, is the successor of McGowan, the original plaintiff, who was made the grantee under a deed subsequently executed by Roche, conveying to McGowan his remaining interest in the property conveyed to these three trustees and which might remain after their performance of the duties devolved upon them by that deed. The plaintiff claims a right to call these trustees to an account, because by the terms of the trust deed to them they were to pay only such depositors as gave subrogations within the time limited in the trust deed, and after such time no payments could be made and the property was then to be conveyed back to the grantor whose residuary interest the plaintiff represents. We do not deem it necessary upon this appeal to decide upon the objections raised by the defendants as to the right of the plaintiff to maintain this action for an accounting. We assume he has such right, and the question remaining is whether any cause of action has been proved against the defendants Develin and Lynch to account for moneys which were turned over to Quinlan under the circumstances herein-after referred to.

The trustees sold a large amount of real property and realized large sums from such sales. Part of the proceeds of

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the sales they deposited with a trust company in the city of New York, but subsequently and from time to time drew it from such company and transferred it to Mr. Quinlan for the purpose of having him at once proceed and pay the depositors and take the subrogations as provided for in the trust deed. The trustees also appointed an agent for the purpose of collecting the rents of the real estate while it was in their hands and before it was sold by them, and such agent collected a little over \$18,000, and turned it over to Mr. Quinlan as one of the trustees. Several sums, amounting in the aggregate to over \$17,000, being the proceeds of sales of a portion of the real estate, came into Mr. Quinlan's hands directly and were never in the possession or under the control of the other trustees. Altogether there came into Mr. Quinlan's hands, including the items of \$18,000 for rents, and the \$17,000 proceeds of sales of real estate above mentioned, a total of \$262,254.25 (being the whole amount of the trust fund converted into money), and he is credited with having paid out \$229,291.29, leaving a balance of \$32,962.96 of the trust fund to be accounted for.

The referee to whom the action was referred found these facts and charged all three of the trustees with the total amount that had come into Quinlan's hands, and credited them with the amount paid out by him, and charged them with the balance as due by reason of their position as trustees. The referee charged the trustees with interest on the balance unaccounted for from the time when the demand was made for it up to the date of his report, in January, 1880, which interest amounted to a little over \$10,000, and upon the whole sum, amounting to over \$43,000, interest was cast from the date of the report until the day of the entry of judgment, February 10, 1883, amounting to over \$8,000, and these items, together with over \$1,800 costs, made a total of \$53,420.58, for which judgment against these defendant trustees was entered February 13, 1883. The ground of liability upon which the referee proceeded was that the defendants Develin and Lynch were guilty of negligence in transferring to their co-trustee, Quin-

lan, the moneys arising from the sales of the real estate, which had come into their hands and which had been deposited in their names to their joint credit with a city trust company, although such transfer was made for the purpose of immediate distribution by Quinlan; and the referee held that such act was a negligent one, and on account of such neglect the two trustees were liable for the failure of Quinlan to account for the whole of the trust moneys that actually came into his hands.

Upon appeal by Develin and Lynch to the General Term that court held that the \$17,000 item above referred to, being the proceeds of the sales of real estate which never had come into the actual possession or control of the two trustees, but which had been paid directly to Quinlan, ought to be deducted from the amount of the recovery, and it directed that such sum, with interest, amounting in all to over \$20,000, should be deducted from the judgment with the consent of the plaintiff, or else that the judgment should be reversed and a new trial granted. The plaintiff consented and the amount was deducted from the judgment in the action, and the defendants Develin and Lynch appeal to this court.

The learned judge at General Term who delivered the opinion of that court stated with his usual accuracy and clearness the general rules governing the liability of trustees in cases of this nature. We fully agree with that court as to the rules which usually obtain regarding the liability of trustees in such cases. It is exceedingly important that they should not be relaxed in any case where the facts bring it within their fair application. Trustees should understand that in taking responsibility as such they do not enter upon merely formal obligations. The one who creates a trust either by deed or will has the right to understand that the trustee in accepting it, while not bound to the greatest possible vigilance in the execution of his duties, is yet bound to give such care and attention to their performance as intelligent men acting in like circumstances would give to their own affairs. In applying, however, the general rules of liability to this case

we think the court below has not given full weight to the peculiar circumstances surrounding it, and it is upon those unusual and most exceptional facts that we base the decision of this case. Such facts take it out of the ordinary rules for the conduct of trustees and leave the case to be judged with reference to its own peculiar and extraordinary surroundings.

When the first trust deed was executed Mr. Quinlan was to be the receiver of this savings institution. This fact was known to Mr. Roche, and, indeed, the designation of the receiver may be said to have been his own. Aside from that Mr. Quinlan was a business man whose capacity and judgment were well known and whose character and integrity were unblemished. The evidence would seem to show that he was probably named as one of the trustees in this trust deed because of his being also named as receiver. The fact was also patent that some office would be necessary for the receiver in which to discharge his duties. He would necessarily have possession of all the books and papers belonging to the bank and it would be necessary to refer to them in making up a list of its depositors and the amount due each respectively. Most of the depositors it may be assumed were personally unknown to the trustees and in many instances it would be necessary to resort to the identification book in order to determine the fact of identity of depositor and claimant. No payment could properly be made on the part of the trustees to any depositor until reference had been made to these books, and the amount of the payments by the receiver, if any, had been ascertained. Under these circumstances what would be more natural than to select that trustee who was also receiver as the proper party to make those payments? There were over 700 depositors. Their debts were due at once, and it could not be accurately known what amounts ought to be in the hands of the paying trustee at any one time in order to permit him to meet all demands. Mr. Quinlan was known and respected for his ability and integrity. He was the receiver, and he alone had all conveniences for ascertaining the depositors and the

amounts due them. There was absolutely no reason to fear or suspect him, and the payments were to be made at once as the creditors should appear. Taking all these circumstances into consideration, we are unable to see that the defendants Develin and Lynch were guilty of such negligence in transferring these funds as to make them liable for the failure of Quinlan to account for all the money that came into his possession as one of such trustees. There is no evidence and no claim that the trustees were guilty of any neglect in the management of their trust, so far as the sale of the real estate and its conversion into money is concerned. There is no claim made and no evidence given upon the subject of any alleged neglect to sell in the best mode, or that on account of any neglect the highest price was not obtained which the property could be fairly expected to bring. The whole charge of neglect lies in the fact that after the conversion of this portion of real estate into money and the deposit of a portion thereof with the trust company subject to the order of all three trustees, the portion so deposited was subsequently from time to time transferred to Quinlan for the purpose of immediate payments by him to the depositors of this broken bank. If the funds had been transferred to Quinlan at a time when there was no pretense of their being needed in order to pay the depositors, and had been thus transferred for his simple convenience, and so that they were liable to be used in the private business of the trustee, a very different case would be presented. But here there is no evidence that the sums transferred to Quinlan were out of proportion to the probable needs of his payments, as those needs existed from time to time. We do not think the trustees were bound to limit their payments to those which might probably be necessary for each day's disbursements by their co-trustee; they were entitled, under all the circumstances of this case, taking into consideration the large amounts due some of the depositors, to transfer to such trustees funds enough to answer all contingencies and more than enough for any one day's or one week's payments. It is unquestionable that in

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the performance of their duties as trustees they had a right to appoint an agent to do some portion of their work, and it is equally undoubted that in appointing an agent they were not precluded from appointing one of their own number. On the contrary, it would seem as if every argument which might be urged in favor of the right to appoint an agent generally, would apply with greater force to the appointment of one of their own number. Here in about two years the trustees sold the real estate which has been sold and collected quite large sums in rents and made payments to the depositors and otherwise accounted for the moneys which came into their possession, so that out of a total of \$262,000 only \$32,000 remained unaccounted for in the hands of Quinlan. Payments were being made from time to time by Quinlan during this whole period, and there is nothing in the record here that we can see from which the inference ought to be drawn that there was any actionable neglect by either of these two trustees in the performance of their trust.

We have read many of the authorities on this branch of the law. They are numerous and the courts have said that if the trustee unnecessarily do an act by which the funds are transferred from the joint possession of all to the sole possession of one, the trustee who does this unnecessary act must be held liable for the due application of the fund by his co-trustee. The question is what is meant by the word "unnecessarily," and it would seem to be that an act is unnecessary when done outside of the usual course of business pertaining to the subject. In *Bruen v. Gillet* (115 N. Y. 10) the funds were turned over to one of the assignees without the slightest necessity, and they continued in the possession of the assignee with the knowledge of his colleague that they were being used in his private business. In *Gasquoine v. Gasquoine* (1894, 1 Ch. 470) an act which was done in the regular course of business in administering the property was held not to be unnecessary, and the trustee was held not liable for a resulting loss by the dishonesty of his co-trustee. Numerous authorities are cited in these two cases upon this subject.

In this case we must say that it was within the fair meaning of the word a necessity; that is, it was an usual, proper and ordinary way to make payments to these 700 odd creditors under the circumstances above detailed, through the hands of one who was acting in the double capacity of trustee and receiver, and who in his latter character had all the data requisite to make the payments and to obtain accurate information as to the amount of the indebtedness in each case. And we do not think it was necessary for each trustee to attend and sign each check and make such payment instead of placing sums from time to time in the hands of the trustee-receiver and permitting him to make the payments.

Although these general views lead to a reversal of this judgment, yet we desire to say that we agree with the General Term that the \$17,000 received by Quinlan directly from the sale of some portion of the real estate was a sum which he had the right to collect as trustee, and, having collected it, his co-trustees, under the circumstances of this case, were not responsible for the proper distribution of such fund by him. On the other hand, we think the General Term and the referee have held the defendants Develin and Lynch to a liability based upon a presumption untrue in fact with regard to the item of about \$18,000, rents received by the appointed agent of the trustees and paid by him over to Quinlan. They have held the two trustees chargeable with this sum on the ground that, as this agent to collect the rents had been appointed by all of the trustees, such rents, when collected by that agent, were legally in their joint possession, and that when the agent paid them to Quinlan it must be held that they were paid by the direction of Develin and Lynch, and hence those defendants are liable to account therefor. We do not think that this is a solid ground of liability in this case, even if we assumed they would be liable if they directed the payments. Upon a question of title, the moneys as soon as they came into the hands of the agent became the property of the trustees, but in this case it is not a question of title. The ground of liability is personal neglect, and it must be remembered that the joint

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appointment of the agent to collect the rents and his collection of them did not, in point of fact, bring those moneys into the actual possession of either Develin or Lynch. The title was in all three trustees; the actual physical possession was in the agent; and when that agent paid them over to one of the trustees without in fact any direction from either of the others, such direction ought not to be imputed to them by a legal fiction when in truth it was not given. The agent, under the circumstances of this case, might naturally pay the rents over to Quinlan, because the latter was at the receiver's office in the discharge of his duties as receiver of the bank at a known place of business, and where the agent could at all times find him to make payment, and where the business of the trustees might very properly have been conducted. Under those conditions we think we should not indulge in legal conclusions for the purpose of holding the trustees to an accountability by reason of implied directions by them when the fact of such directions was not proved and did not exist.

If this item of \$18,000 were added to the \$17,000 item deducted by the General Term, the total of these two sums would be greater than the amount which the referee found had not been accounted for out of the whole amount that had been received by Quinlan, and so there would be nothing due the plaintiff for which Develin and Lynch could be held liable.

We think, upon a careful deliberation over this unusual and exceptional state of facts, that the plaintiff failed to make out a cause of action for negligence against the defendants Develin and Lynch; and while, as we said before, the rules governing the liability of trustees should be strictly maintained, and they should be held to the most rigid accountability for the performance of all their duties as such, yet in all cases the true question is, taking into consideration all the facts and circumstances, has the trustee employed such prudence and diligence in the discharge of his duties as in general men of average prudence and discretion would under like circumstances employ in their own affairs, and in determining the proper answer to be given to that question we are to look

at the facts as they exist at the time of their occurrence, not aided or enlightened by those which subsequently take place by reason of which the loss has occurred.

Judged by that standard we think the conclusions of law of the referee holding these defendants Develin and Lynch liable are erroneous, and the judgment as to them should, therefore, be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

M. WALLACE CLARKE, Appellant, v. ELIZA W. CLARKE,
Individually, etc., Respondent.

C. died leaving a will by the terms of which he devised to his widow the use of his "homestead premises," the only real estate left by him, during her life, and the remainder to the testator's legal heirs. The will directed that the taxes and repairs on the premises should be paid by the executor from the general estate in his hands "without burden or charge" upon an annuity also given the widow. It was further provided that in case the widow "should rent the whole or any part of said homestead she shall pay a part of the taxes * * * proportionate to the part so rented," and that the executor, on paying such taxes as she should pay, might retain the same out of the annuity. The general estate became exhausted, and thereafter the taxes and annuity were not paid. The property was sold for unpaid taxes and was redeemed by plaintiff, one of the remaindermen. In an action to compel payment of the taxes by the widow, or the appointment of a receiver to rent the premises and apply the rents and profits to such payment, *held*, that the intent of the testator was that the general estate should bear the burden of the expenses connected with the maintenance of the life estate, and that in no event, save in that specified, *i. e.*, a rental by the widow, should her life estate be charged with the taxes; and so, that it was the duty of the remaindermen to pay the same.

Woodward v. James (115 N. Y. 846), distinguished.

(Argued March 15, 1895; decided April 9, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 23, 1894, which affirmed a judgment

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in favor of defendant entered upon an order dismissing the complaint on trial at Special Term.

This action was brought for a construction of the will of David Clarke, deceased, and for the appointment of a receiver of certain premises in which defendant has a life estate under said will, for the purpose of renting the same and paying taxes out of the rents.

The facts and portions of said will, so far as material, are stated in the opinion.

W. T. Dunmore for appellant. As between the life tenant and the remainderman the former should pay the taxes. (*In re Albertson*, 113 N. Y. 434, 438; Gerard's Titles to Real Estate [2d ed.], 153, 154; *Sidenberg v. Ely*, 90 N. Y. 257; 2 Washb. on Real Prop. 97; *Stillwell v. Dougherty*, 2 Bradf. 317; *Lawrence v. Holden*, 3 id. 142; *Bidwell v. Greenshield*, 2 Abb. [N. C.] 427; 2 Perry on Trusts, § 554; Hill on Trustees [4th Am. ed.], 395; *Gelston v. Shields*, 16 Hun, 143; *Leavenworth v. Cooney*, 48 Barb. 570; *De Witt v. Cooper*, 18 Hun, 69; *In re Miller*, 1 Tuck. 346; *House v. House*, 10 Paige, 158.) The fact that testator directed that the taxes upon the property conveyed for life should be paid out of another fund, is no evidence of an intention to relieve the life tenant of said taxes after that fund is exhausted, or upon its proving insufficient. (*Woodward v. James*, 115 N. Y. 346; *Bidwell v. Greenshield*, 2 Abb. [N. C.] 427; *Whitson v. Whitson*, 53 N. Y. 479.) To sustain a construction in a will whereby capital is impaired in the payment of taxes, expenses and interest, the direction should be unequivocal and unmistakable. (*Woodward v. James*, 115 N. Y. 346, 360; *In re Albertson*, 113 id. 434, 440; *Stillwell v. Dougherty*, 2 Bradf. 317; *Lawrence v. Holden*, 3 id. 142; *De Witt v. Cooper*, 18 Hun, 69.) No trust was created by the will, and no title to the real estate vested in the trustee. Hence no power to raise money as trustee for payment of taxes is given by the will. (*Clift v. Moses*, 116 N. Y. 144; *Chamberlain v. Taylor*, 105 id. 185; *Weeks v. Cornwall*, 104 id. 325.) To

hold that the life tenant is not liable for the taxes is inequitable and would probably result in the property being wasted by tax sales. (Laws of 1867, chap. 361; Laws of 1881, chap. 640.) The remedy of the remaindermen in case of failure of the tenant to keep down the taxes upon real property in possession of the life tenant is by an action to compel the life tenant to do so, and in case of failure to have a receiver appointed of the property. (*Sidenberg v. Ely*, 90 N. Y. 257; Code Civ. Pro. §§ 217, 713; *Hollenbeck v. Donnell*, 94 N. Y. 342.) The plaintiff has a right to maintain this action not only in his own behalf but in behalf of others similarly situated, or who have an interest in common with him. (Code Civ. Pro. §§ 448, 498, 499; *Farnham v. Barnum*, 2 How. [N. S.] 396; *McKenzie v. L'Amoureux*, 11 Barb. 516; *Towner v. Tooley*, 38 id. 598; *Hammond v. H. R. I. Co.*, 20 id. 878; *Jones v. Fitch*, 3 Bosw. 63; *Kerr v. Blodgett*, 48 N. Y. 62; *Pouty v. M. S. & M. I. R. R. Co.*, 4 T. & C. 230; *Thompson v. Brown*, 4 Johns. Ch. 619; *Ross v. Crary*, 1 Paige, 416; *Hallett v. Hallett*, 2 id. 15; *Petrie v. Lansing*, 66 Barb. 357.)

Chas. W. Williams for respondent. The appointment of a receiver is not a matter of right, but of discretion. The trial court in refusing such appointment exercised such a discretion, which, upon all the facts, was approved by the General Term, and its decision is not reviewable here. (3 Pom. Eq. Juris. § 1331; Code Civ. Pro. § 713; *Salloy v. Leaver*, L. R. [9 Eq.] 25; chap. 315, Laws of 1894; *Morse v. Smith*, 42 N. Y. S. R. 168, 170.) The life estate of the widow is not chargeable with the taxes assessed during its continuance. (*Mosley v. Marshall*, 22 N. Y. 202; *Thomas v. Evans*, 105 id. 612; *Gilbert v. Taylor*, 76 Hun, 93; *Moore v. Alden*, 80 Maine, 306; *Thurber v. Chambers*, 66 N. Y. 42; *Phillip v. Phillip*, 112 id. 197-205; 4 R. S. [8th ed.] 2461, § 2; *Besson v. W. S. R. R. Co.*, 143 N. Y. 128; *Vanderpool v. Loew*, 7 id. 304; *In re Vowers*, 113 id. 569; *In re French*, 13 N. Y. S. R. 759; *Phillips v. Davies*,

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92 N. Y. 199, 208; *Riker v. Cornwall*, 22 N. Y. S. R. 152, 156; *Weeks v. Cornwall*, 104 N. Y. 337.) The widow's annuity is a preferred claim and a charge upon the real estate, and consequently is superior to the title of the plaintiff. (*Hoyt v. Hoyt*, 85 N. Y. 142; *Isenhardt v. Brown*, 1 Edw. Ch. 411; *Rowe v. Lansing*, 53 Hun, 210, 212; *Ex parte McComb*, 4 Bradf. 151; *In re Chancey*, 119 N. Y. 77, 84; *Whitney v. Munro*, 4 Barb. Ch. 5; *Stimson v. Vrooman*, 99 N. Y. 74; *In re James*, 80 Hun, 372; *In re McKay*, 5 Misc. Rep. 123-126; *Moore v. Alden*, 80 Maine, 301; *Towle v. Swasey*, 106 Mass. 100; *Wright v. Callendar*, 2 DeG., M. & G. 652; *Nutter v. Vickery*, 64 Maine, 490-497; *Roper on Legacies*, 433; *Starr v. Starr*, 43 N. Y. S. R. 556; *Scofield v. Adams*, 12 Hun, 366; *Pittman v. Johnson*, 35 id. 41; *Bliven v. Seymour*, 88 N. Y. 470; *In re Dols*, 4 Redf. 511; *Bowden v. Jenks*, 140 Mass. 562; *Williamson v. Williamson*, 6 Paige, 298, 304; *Wood v. Nesbit*, 62 Hun, 455; *In re Mahan*, 32 id. 73; *Shulters v. Johnston*, 38 Barb. 80; *In re Kick*, 11 N. Y. S. R. 628; *R. C. Church v. Wachter*, 42 Barb. 43; *Flannigan v. Flannigan*, 8 Abb. [N. C.] 413; *Stewart v. Chambers*, 2 Sandf. Ch. 382, 434; *Scott v. Stebbins*, 91 N. Y. 611; *Tracy v. Tracy*, 15 Barb. 505.) There is a defect of proper parties. (Code Civ. Pro. §§ 446, 451; *Bear v. A. R. T. Co.*, 36 Hun, 400; *Moulton v. Cornish*, 138 N. Y. 136; *Brainerd v. Bertram*, 5 Abb. [N. C.] 102; *Pierson v. Gillespie*, 21 N. Y. S. R. 55; 51 Hun, 638; *Kirk v. Young*, 2 Abb. Pr. 453; *Mahr v. N. U. F. Ins. Soc.*, 127 N. Y. 459; *Baumgrass v. Brickell*, 7 N. Y. S. R. 685; *Petrie v. Petrie*, 7 Lans. 90; *Gueli v. Lenihan*, 29 N. Y. S. R. 294; *Power v. Cassidy*, 79 N. Y. 603; *Moore v. Hegeman*, 6 Hun, 290; *Hallett v. Hallett*, 2 Paige, 15; *Galusha v. Galusha*, 138 N. Y. 281; *Lazarus v. M. R. R. Co.*, 69 Hun, 191; *Ponder v. N. Y., L. E. & W. R. R. Co.*, 72 id. 384.)

GRAY, J. It was held below in this case that the defendant, as the life tenant of certain premises, consisting of a house

and lot in the city of Rochester, was not, as between herself and the heirs of the testator, who were remaindermen, chargeable with the taxes upon that property and that the rents and profits thereof could not be compulsorily applied for that purpose. The testator, David Clarke, died in 1874, leaving a will upon which letters testamentary were issued to the executor named therein. The executor was subsequently removed from his office and then letters of administration with the will annexed were granted to this defendant, who was the testator's widow. The will devised to the widow "the use during her life of said homestead premises;" and it was therein directed that the taxes, repairs, etc., should be paid by the executor from the general estate in his hands "and without burden or charge from the annuity," which was given to her by subsequent provisions of the will. It was also, further, therein directed, that, in case his wife "should rent the whole or any part of said homestead, she shall pay a part of the taxes, etc., proportionate to the part so rented." The executor on paying such taxes, etc., which the wife should pay, in that case, might retain such payment out of the wife's annuity. The testator gave to his widow an annuity of \$400, besides a small sum of money outright. The residue of the testator's estate, after certain bequests which were to be paid after the widow's death, was given to his executors, with power to sell and make distribution among his legal heirs. The general estate became exhausted and then the taxes ceased to be paid. The widow's annuity also, as it seems, was not paid for several years. The property had been sold for unpaid taxes and had been redeemed by the plaintiff; who was one of the testator's heirs at law and who now seeks by this action to compel the payment of the taxes imposed upon the life estate by the widow, or, through a receiver to be appointed thereof, an application of its rents and profits thereto.

In the consideration of this will, with reference to the question raised by the appellant, we are to be guided by what may be apparent as the testator's intention. Any general rule, which has been established by the courts with reference to the

construction of testamentary provisions, must give way to an evident intention to the contrary. So, here, though by the general rule the life tenant, as between herself and the remaindermen, would be bound to pay the taxes imposed, it is sufficiently clear, upon a consideration of the several provisions which the testator has made in his will, that he intended no such liability ever to rest upon his widow. The negation of any such idea on his part, appearing at first in the direction with respect to the payment of the taxes by the executor from the general estate, is made certain by the subsequent clause which provides for a case when the wife should pay the taxes, viz.: if she should rent the property. This direction for her to pay the taxes in a particular event seems, logically, to exclude the obligation for her to pay them in any other event. The scheme of the will seems to be that the general estate should bear the burden of the expenses connected with the maintenance of the life estate, which was the only real property left by the testator; and whether the testator did or did not suppose that it would be at all times sufficient for that purpose, and for the purpose of paying the bequests and annuities, is not shown and is not very material in view of such express provisions as we find. Upon the cessation of the life estate in the realty, by the death, or re-marriage, of the widow, as the case might be, that, as well as what might exist of other property, was given to the legal heirs of the testator. The legal effect was to vest in those persons, answering the description of testator's legal heirs, the title to the realty, subject only to the life estate of the widow. Possessing that interest, it was the duty of the testator's heirs, in view of the positive direction in his will with respect to the life estate, in their own interests, to keep down the taxes. This case differs from that of *Woodward v. James* (115 N. Y. 346), upon which the appellant places great reliance. In that case we do not find that clear negation of any liability resting upon the widow, in the contingency that the general estate might prove insufficient to pay the taxes, which we think exists in the present case. As Judge FINCH said in the case cited: "The language of the

will, freeing her half from any deductions, was used in connection with the provision imposing the burden on the other half and without reference to an emergency which the testator did not contemplate and for which, therefore, he did not provide." In the James will the income from the estate was divided, one-half to the widow and the other half to the testator's heirs, after first discharging from their half all taxes, assessments and charges against the testator's estate. When it was found that half the income was insufficient to discharge those obligations of the estate, the question arose as to whether the widow's half of the income might be resorted to to pay the deficiency; or whether the *corpus* of the estate should be drawn upon. The inference could be indulged in that case of a contingency not anticipated by the testator, and the construction, not in apparent violation of any intention of the testator, was adopted, that, rather than resort to the *corpus* of the estate, the widow's income should be applicable. But here a construction upon similar lines must violate what, as I have endeavored to show, was the clear intention of the testator that in no event save one should the life estate be chargeable with taxes, etc.

These views are in harmony with those expressed upon this question by Mr. Justice BRADLEY, in his opinion at the Special Term, and lead to the conclusion that the judgment appealed from should be affirmed, with costs.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

THE CITY OF SCHENECTADY, Appellant, v. CATHARINE A. FURMAN et al., as Executors, etc., Respondents.

A city has no power to take and appropriate the natural and permanent banks of a non-navigable stream within the municipality without paying to the owner compensation therefor.

Plaintiff's common council passed certain resolutions declaring that obstructions and deposits existed in M. creek, a non-navigable stream, not a public highway, running through the lands of F., defendants'

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testator, within the city limits, which obstructions caused stagnant water to accumulate detrimental to health, etc., and requiring the same to be removed at the expense of the owners or occupants. The resolutions contained a description of the width and depth of the creek, which was declared to be its natural and normal channel and grade, and all matter lying in the creek above such grade and channel to be obstructions and deposits. After the adoption of the resolution F. cleaned out the portion of the creek flowing through his lands to its natural and normal bed and banks. Thereafter plaintiff's superintendent of streets entered, cut down the banks and trees growing thereon, and widened the natural channel. *Held*, that an action was not maintainable to recover the expenses so incurred; that the work done by F. was all that the common council had power to require. Reported below, 78 Hun, 87.

(Argued March 18, 1895; decided April 9, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 8, 1894, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Circuit without a jury.

The nature of the action and the facts, so far as material, are stated in the opinion.

S. W. Jackson for appellant. The resolution of April 16, 1889, by the confirmation thereof, is conclusive in this action as to all the facts therein stated and adjudged. They are *res judicata*. (*In re De Peyster*, 80 N. Y. 572; *In re Amsterdam*, 126 id. 164; *Suprs. v. Briggs*, 2 Den. 33; *Van Wormer v. Mayor, etc.*, 15 Wend. 263; *Demarest v. Darg*, 32 N. Y. 290; *Smith v. Hemstreet*, 54 id. 644; *White v. Coatsworth*, 2 Seld. 139; *Gates v. Preston*, 41 N. Y. 113; *Colton v. Beardsley*, 38 Barb. 29-39; *Merewood v. New York*, 6 How. Pr. 386-388; *Wiencke v. N. Y. C. & H. R. R. Co.*, 133 N. Y. 656; *Bumstead v. Reed*, 31 Barb. 661; *Roderigas v. E. R. S. Inst.*, 63 N. Y. 464; *Porter v. Perry*, 29 id. 106.) The exercise of the police power of a municipal corporation for the abatement of a nuisance at the expense of the owner of the land where it exists, is not limited to nuisances created

or maintained by such owner. (*Vill. of Carthage v. Fredericks*, 122 N. Y. 268; *Wenzlich v. McCotter*, 87 id. 127.) Every citizen holds his property subject to the proper exercise of this police power, either by the state directly or by municipal corporations to which the state may delegate it. Laws of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. (*Vill. of Carthage v. Frederick*, 122 N. Y. 268; *Hart v. City of Albany*, 9 Wend. 593; *Mayor, etc., v. Williams*, 15 N. Y. 502; *Lawton v. Steele*, 119 id. 226; *Coates v. Mayor, etc.*, 7 Cow. 585; *Comm. v. Alger*, 7 Cush. 84; *Watertown v. Mayo*, 109 Mass. 315.) "Due process of law" is a due course of legal proceedings adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to enforce and protect his rights. (*Stuart v. Palmer*, 74 N. Y. 191; *Parker & Worthington on Public Health & Safety*, § 248; *People v. Board of Health*, 58 Hun, 599; *Davison v. City of New Orleans*, 96 U. S. 97.)

Robert J. Landon for respondent. The resolution of April sixteenth was not complied with by the common council, and the common council did not give notice of a hearing upon the amendment, and did not, after a hearing, again consider the amendment and confirm or modify it. No foundation, therefore, has been laid for defendant's liability. (61 Hun, 171-174; *Sharp v. Speir*, 4 Hilt. 76; *In re Douglass*, 46 N. Y. 42; *In re City of Buffalo*, 78 id. 362; *In re Anderson*, 60 id. 457; *Osterhout v. Rigney*, 98 id. 222-234; *Kamp v. Kamp*, 59 id. 212; *Schenck v. Mayor, etc.*, 69 id. 444; *Rockwell v. Carpenter*, 25 Hun, 529; *Adams v. Ash*, 46 id. 105; *Ashton v. City of Rochester*, 60 id. 372.) The charter power to establish and define the boundaries and grade of the creek is independent of the power by resolution to direct and require the removal of deposits, and it is only as to the latter power that an opportunity to be heard is afforded. The establishment of the boundaries and grade is, therefore, with-

out due process of law and void. (*Tripler v. Mayor, etc.*, 125 N. Y. 617; *Stuart v. Palmer*, 74 id. 183; *Remsen v. Wheeler*, 105 id. 573, 579; *In re U. E. R. R. Co.*, 112 id. 61, 75.) The common council had no power to adjudge as it did that "all earth and other matter lying in and above such grade and channel as so described are obstructions and deposits in said stream." (*In re Lange*, 85 N. Y. 307; *McLean v. Jephson*, 123 id. 142; *In re Walker*, 136 id. 29; *Beardslee v. Dolge*, 143 id. 160.) If plaintiff insists that the confirmation on April twenty-third made all matters contained in the resolution of April sixteenth *res adjudicata*, a sufficient answer is that the city did not comply with that resolution. (*In re Lange*, 85 N. Y. 310.) The city, in carrying out the resolution and while acting within the resolution, widened the stream. The charter expressly restricts the power of the common council in the premises by these words: "Provided, however, that none of the rights of any of the owners of land bounded or abutting upon such watercourses or streams, shall be impaired or affected by this act." (Laws of 1877, chap. 146, § 2; *Sharp v. Johnson*, 4 Hill, 92.) The scheme of determining the boundaries and grade of natural watercourses and directing and requiring the removal of obstructions, deposits and encroachments provided by the charter, whether taken in its separate parts or as an entirety, is unconstitutional, in that it is a taking of private property without due process of law, and without just compensation. (*People v. Platt*, 17 Johns. 195; *Smith v. City of Rochester*, 92 N. Y. 463; *Clinton v. Myers*, 46 id. 511; *Bullard v. S. V. M. Co.*, 77 id. 525; *Sage v. City of Brooklyn*, 89 id. 189, 195, 196; *Gardner v. City of Newburgh*, 2 Johns. Ch. 162; *People v. Haines*, 49 N. Y. 587; 61 Hun, 177.) The charter provisions for the collection of the cost and expense are unconstitutional in that they do not provide for a hearing of the lot owner. (*Stuart v. Palmer*, 74 N. Y. 183; *Remsen v. Wheeler*, 105 id. 573; *In re McPhearson*, 104 id. 306, 321; *In re U. E. R. R. Co.*, 112 id. 61, 75; *People v. O'Brien*, 111 id. 1, 62; *McLaughlin v. Miller*, 124 id. 510, 517;

Davidson v. City of New Orleans, 96 U. S. 97; *Hager v. Reclamation Dist.*, 111 id. 701; *Kentucky Tax Cases*, 115 id. 321; *Dent v. West Virginia*, 129 id. 114.) The charter scheme upon which this suit depends is unconstitutional and void, for the reason that by it the cost of the work is made a personal charge to the extent that the lot owner is possessed of goods and chattels, instead of a charge upon the land. (*Davidson v. City of New Orleans*, 96 U. S. 106.)

HAIGHT, J. This action was brought to recover the expenses incurred by the plaintiff in removing certain alleged obstructions and deposits from Mill creek where it runs through the lands of the defendants' testator. Mill creek is a non-navigable, natural watercourse, not a public highway, running through the plaintiff's boundaries. On the 16th day of April, 1889, the plaintiff's common council adopted a series of resolutions in and by which they declared that obstructions and deposits existed in Mill creek running through the defendants' testator's lands and that such obstructions and deposits caused large bodies of stagnant water to accumulate detrimental to health, the removal of which was proper and necessary and that such removals should be made at the expense of the owners or occupants of the lots adjoining that portion of the creek. The resolution then proceeded to describe the width and depth of the creek and concluded by adjudging the description so given to constitute the natural and normal channel and grade of the creek, and that all earth and other matter lying in and above such grade and channel, as described, to be obstructions and deposits in the stream. The description, however, does not locate the center line of the stream or the banks thereof farther than to specify the width of the channel. The five days' notice required by the charter of the final adoption of these resolutions was then given and on the 23rd day of April they were ratified and confirmed. Subsequently, and on the 7th day of May, 1889, the common council adopted another resolution amending that adopted on the 16th and confirmed on the 23d, by

reducing the width of the stream and changing the slopes of the banks. Thereafter and in August, 1889, the plaintiff's superintendent of streets entered Mill creek where it flows through defendants' premises, cut down banks and widened the natural channel of the stream, excavating the earth therefrom, and in so doing cut several trees growing on the banks thereof and dug out the stumps, making a new channel for the creek. Can the plaintiff recover for the expenses incurred in doing this work?

The trial court has found as a fact that after the adoption of the resolutions alluded to and during the month of July, 1889, and before the plaintiff's superintendent entered upon the excavation of the creek, the defendants' testator cleaned out the creek where it flowed through his lands from bank to bank to the hard pan thereof, and to the natural and normal bed and banks of the stream. These findings are based upon the testimony of the witness McGowan whose statement we do not understand to be controverted. To our minds these findings dispose of the plaintiff's case, for, assuming the resolutions of the plaintiff's common council to be regular, these findings show a compliance therewith on the part of the defendants' testator. He caused the channel of the creek to be cleaned to the natural and normal banks and bed thereof. This is all that the common council had the power to require. If by its resolutions it required more they were unauthorized and void, for the city had no right or power to take and appropriate his lands along the natural and permanent banks of the stream without rendering him compensation therefor either under the Constitution or the statutes. This question was fully discussed by LEARNED, P. J., when this case was first considered in the General Term. (61 Hun, 171.) We fully approve of the views then expressed with reference to this branch of the case.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

HENRY A. BUCK et al., as Administrators, etc., Respondents,
v. WILLIAM S. ALLEY et al., Appellants.

The provision of the Limited Partnership Act (1 R. S. 766, § 13, as amended by chap. 476, Laws of 1862), which requires that the business of such a partnership shall be conducted under a firm name in which the names of the general partners only shall be inserted, but provides that where there are one or more general partners the firm name may consist of one or more with or without the addition of the words "and Company" or "& Co.," does not authorize the use of those words to represent the special partner where there is but one general partner.

The use of those words, however, in such a case does not make the special partner liable as general partner; that penalty, so far as the firm name is concerned, is affixed only where the name of the special partner is used therein with his privity.

(Argued March 19, 1895; decided April 9, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 16, 1894, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Circuit without a jury.

This was an action upon a promissory note given by the firm, doing business under the name of W. S. Alley & Co., to Elisha A. Buck, plaintiffs' intestate. Said firm consisted of W. S. Alley, as general partner, Ferdinand T. Hopkins and Thomas H. Thomas, as special partners. The execution of the note by Alley in the name of the firm was admitted. All of the partners were made parties defendant, but only the special partners were served with process and appeared in the action. They were sought to be made liable as general partners, because of the use of the "& Co." in the firm name.

Austin Abbott for appellants. The statute expressly permits the use in the firm name of the name of the general partner with the addition of the words "& Co." (Laws of 1866, chap. 661, § 13.) The firm name of "W. S. Alley & Co." is the proper mode of designation of this firm, which contained

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but one general partner. (*Zimmerman v. Erhard*, 83 N. Y. 74; Pars. on Cont. [4th ed.] 413, § 98; *Oliphant v. Mathews*, 16 Barb. 608; *N. Bank v. Ingraham*, 58 id. 290; Lindley on Part. 182; *Etheridge v. Binney*, 9 Pick. 272.) It is not the policy of the law to charge special partners for technical deviations from the requirement of the statute which do not affect the rights of creditors. (*M. Co. v. Laimbeer*, 108 N. Y. 578; *Bowen v. Argall*, 24 Wend. 495.) The tendency of recent legislation is against the contention of the plaintiffs. (*Ward v. Newell*, 42 Barb. 482; *Bradbury v. Smith*, 21 Maine, 117; *Andrews v. Schott*, 10 Penn. St. 47; *Vilas v. Bullock*, 10 Phila. 309.)

Waldo W. Willard for respondents. The partnership of W. S. Alley & Co. never had any inception as a limited partnership. (Laws of 1866, chap. 661, § 13; *Bell v. Merrifield*, 28 Hun, 219; Pars. on Part. [4th ed.] § 421.) The defendants, in the conduct of their business, subsequent to the filing of their certificate on May 26, 1890, made themselves liable as general partners to pay the note in suit. (Pars. on Part. [4th ed.] § 421; Bates on Lim. Part. §§ 57-61; 13 Am. & Eng. Ency. of Law, 817; *Ward v. Newell*, 42 Barb. 482; *Van Ingen v. Whitman*, 62 N. Y. 513; *M. C. Bank v. Gould*, 5 Hill, 309; *Andrews v. Schott*, 10 Penn. St. 47; *M. Bank v. Gruber*, 14 Wkly. Notes, 12; *Gibbs v. Mershon*, 14 id. 89; *Bradbury v. Smith*, 21 Maine, 117.)

ANDREWS, Ch. J. The claim that section 13 of the Limited Partnership Act (2 Rev. St. 704), as amended by c. 661 of the Laws of 1866, permits the use by a limited partnership of the words 'and Company,' or '& Co.,' as a part of the firm name, to represent the special partner, cannot be supported. The section, so far as now material, is as follows: "The business of the partnership shall be conducted under a firm in which the names of the general partners only shall be inserted, except that where there are two or more general partners the firm name may consist of either one or more of such general

partners, with or without the addition of the words 'and Company,' or '& Co.,' and if the name of any special partner shall be used in such firm with his privity, he shall be deemed a general partner; but the said partnership shall put upon some conspicuous place on the outside and in front of the building some sign on which shall be printed in legible English characters all the names in full of all the members of said partnership," etc. By the natural reading of the section the use of the words 'and Company,' or '& Co.,' are only permitted where there are two or more general partners, in which case the firm name may consist of the names of one or more of the general partners and of the addition 'and Company,' or '& Co.,' to represent the general partners whose names are not expressed. The section makes a special partner liable as a general partner, if his name is used in the firm title with his privity. It is difficult to suppose that the legislature, while interdicting the use of his name, except at this hazard, intended at the same time to permit the use of an addition to represent him. The history of section 13 strongly corroborates this view. It discloses a consistent purpose in the legislature from the beginning to prevent the name or the existence of a special partner to be indicated in the firm name. The original policy was doubtless to prevent credit being given to a person not liable as a general partner for the debts or liabilities of the firm, though this policy has been greatly modified and to a great degree subverted by recent legislation. The original section passed in 1822 (C. 244, sec. 4) required that the business of a limited partnership should be conducted "under a name or firm name consisting of the names of all the partners interested, excepting special partners, whose names shall not be used under the penalty of being liable as general partners." Section 13 of the Limited Partnership Act in the Revised Statutes, relating to the same subject, and which superseded section 4 in the act of 1822, omitted the requirement that the names of all the general partners should be inserted in the firm name, and in place of that requirement prescribed that the

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business should be "conducted under a firm in which the names of the general partners only shall be inserted, without the addition of the word 'company' or any other general term." This was the first enactment referring to the use of the addition "company" in the name of limited partnerships, and such use was prohibited. Under this section the firm name might be that of one or more of the general partners, but it could not be supplemented by the word "company" or any other general term. The firm name might comprise the names of all the general partners or a part of them only, but if part only were named the suggestion that there were others could not be made through the vague designation of "company" or the use of a similar general word. The amendment of section 13 by chapter 476 of the Laws of 1862, modified the provision prohibiting the use of an addition, contained in the original section, and declared that where there are more than two general partners the firm name may consist of either two of such partners with the addition of the words "and Company," and made provision for the first time requiring that a sign should be placed on the building occupied by the partnership containing the names of all the partners. The amendment of 1862 was designed to relieve the general partners where there were more than two (all of whom might desire to be represented in the firm name) from the inconvenience of having all the names inserted in the title and to permit the addition "and Company" to be added to represent them. The amendment in no respect modified the position of a special partner. The amendment was not intended to give him representation in the firm name. His position was unchanged, and the provision remained as originally enacted, that "if the name of the special partner shall be used in such firm name, with his privity, he shall be deemed a general partner." There was obvious propriety in permitting general partners to be represented by the addition "and Company," but none in view of the policy of the legislature to extend this privilege to special partners. Section 13 was again amended by chapter 43 of the Laws of 1864 by

removing the restriction in the amendment of 1862 of the use of the addition to the case where there was more than two general partners, and allowing it to be used "where there are two or more," and the section was again amended by chapter 661 of the Laws of 1866, which did not change the section in any respect relevant to the present case from what it was under the amendment of 1862. This review of the course of legislation seems to show beyond reasonable doubt that the legislature, from the time of the act of 1822 through all the changes in the law on the subject of the firm name, have maintained the principle that the firm name of a limited partnership should represent only general partners, and that the modification intended by the amendments in the subsequent revisions of section 13 were designed to remove the stringency of the original enactment so that general partners might be represented in the firm name, either by specification or by inclusion under the addition "and Company." This interpretation of the statute leads to the conclusion that the use of the firm name of W. S. Alley & Co., in the business in which the defendant William S. Alley was the sole general partner, and the defendants Ferdinand T. Hopkins and Thomas H. Thomas were special partners only, was unauthorized and in violation of the implied prohibition of section 13 of the Limited Partnership Act.

The remaining question is whether its use in this case, made as the certificate shows, with the privity of the special partners, rendered them liable as general partners for the debts of the firm. In *Ward v. Newell* (42 Barb. 482) the question was presented and considered by CLERKE, J., who delivered the prevailing opinion in that case and who "was inclined" to the opinion that such a firm designation rendered the special partners liable as general partners, but the judgment proceeded on another ground. In no case in this state, so far as we can ascertain, has it been so adjudged prior to the decision in the present case. The question depends upon the construction of the statute, and in construing a statute all its provisions may be considered to arrive at the intention of the legis-

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lature. The remark of COWEN, J., in *Bowen v. Argall* (24 Wend. 501) that "no doubt the provision of 1 Rev. St. 753, prescribing the manner of instituting limited partnerships must be substantially complied with, or the creditors may treat the members of the firm as general partners," may be admitted as stating a true general principle applicable to the construction of the Limited Partnership Act. But he held in that case that it is not every departure from the provisions of the act which would subject a special partner to a general liability. There a general partner had made a general assignment for the benefit of creditors, which provided for the payment of a debt due to a special partner ratably with the other creditors of the firm, which was held by the chancellor in *Mills v. Argall* (6 Paige, 577) to be a violation of the 23d section of the Limited Partnership Act, and Judge COWEN, in his opinion, assuming the correctness of the decision of the chancellor, said: "I see nothing in the act declaring as a consequence of an assignment or other act providing for the forbidden preference, that the special partner should thereby become liable as a general one. The only consequence of the construction contended for by the plaintiff in error would be the avoiding of the partnership provision for the benefit of other partnership creditors."

Coming to a particular consideration of the question now presented, and looking at the Limited Partnership Act, the first thing which strikes the attention is that section 13 contains only an implied prohibition of the use of the addition 'and Company,' or '& Co.,' to designate a special partner, and does not declare any consequence of such unauthorized addition, but that the section does affirmatively declare that when the name of the special partner shall be used in the firm name with his privity "he shall be deemed a general partner." It affixes the penalty to the use of the name only. This is not the only instance where the penalty of liability as a general partner is imposed in express terms for violations of the provisions of the act. Indeed, it is difficult on an examination of the various provisions to escape the conclusion that where the legislature intended this result to follow it so declared in unmistakable

terms. The 8th section declares that if any false statement be made in the certificate or affidavit required to be filed on the organization of the partnership, "all the persons interested in such partnership shall be liable for all the engagements thereof as general partners." The case of *Van Ingen v. Whitman* (62 N. Y. 513), and *Durant v. Abendroth* (69 id. 148), were founded on a violation of this section. Section 9 declares a similar penalty if the publication of the terms of the partnership shall not be made as required thereby, and the special partner was held liable for a non-compliance with this section in *Smith v. Argall* (6 Hill, 479), which was affirmed on error (3 Den. 435), the court saying: "The consequence is declared in plain terms; the partnership shall be deemed general." The 11th section, which prescribes the manner of renewing or continuing a limited partnership, declares: "And every such partnership which shall be otherwise renewed or continued, shall be deemed a general partnership." Section 12 provides that every alteration "made in the name of the partners, in the nature of the business, or in the capital or shares thereof, or in any other matter specified in the original certificate, shall be deemed a dissolution of the partnership, and any such partnership which shall be in any manner carried on after any such alteration shall have been made, shall be deemed a general partnership, unless renewed as a special partnership according to the provisions of the last section." In *Beers v. Reynolds* (11 N. Y. 97) the special partner, before the time fixed in the certificate for the termination of the partnership, sold out his interest to the general partner and took a mortgage on the goods to secure the consideration. It was held that this was a violation of the 12th section and that the special partner was liable as a general partner to a creditor who dealt with the partnership afterwards without notice. Section 13, as stated, prescribes the penalty of general liability where the name of the special partner is used in the firm name with his privity. Section 17 prohibits the special partner from transacting any business on account of the partnership as

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agent, attorney or otherwise, and declares that "if he shall interfere contrary to these provisions, he shall be deemed a general partner." We have said that no case in this state except the present one has imposed the penalty of general liability upon a special partner for having the addition of 'company' to the firm name, where there was but one general partner. Nor have we found any case imposing such liability for any departure from the act, except where this penalty is specifically prescribed. The case of *Madison County Bank v. Gould* (5 Hill, 309) is not an exception. In that case the special partner had drawn out his contribution of capital and it had been invested in real estate, used in the business, the title to which was conveyed to all the partners, general and special, as tenants in common. The court held that, assuming that this was done with the concurrence of the special partner, it was a violation of the 17th section of the act prohibiting the special partner transacting any business on account of the partnership. The withdrawal of capital contributed by him as special partner violates section 15 of the act, and the court further held that this would make him liable as a general partner. We are not prepared to say that an act so subversive of the whole policy of the statute might not be justly visited by the imposition of a liability as general partner, even if not so declared. But the withdrawal of capital by a special partner is a plain violation of section 12. It was an alteration in the capital of the business. Judge BRONSON, in the case cited, referred to the fact that the legislature evidently intended that the legal title to all the partnership property should be vested in the general partners. It was a most material change in the capital to withdraw the contribution of the special partner from the business and put it into land, the title to which was vested in all the partners jointly, including the special partner. Moreover, if the purchase of the mill, with the co-operation of the special partner, was doing business in violation of the 17th section, the withdrawing of his capital by his participation was an intermeddling with the business also. Both sections 12 and 17 specially

declare the penalty of general liability for a violation of their provisions.

It is claimed in behalf of the plaintiff that as section 1 of the act declares that limited partnerships may be formed "upon the terms, with the rights and powers, and subject to the conditions and liabilities herein (in the act) prescribed," and as section 13 impliedly prohibits the use of the addition "company" to a firm name where there is but one general partner, the conditions upon which a limited partnership is permitted have not been complied with, and that the parties stand as if the formation of a limited partnership had never been attempted. There was no irregularity other than the one specified. The certificate made and filed stated the "name or firm under which the partnership is to be continued." (Sec. 4.) The only defect in the proceedings is that the firm name, W. S. Alley & Co., was not permitted by section 13, under the circumstances. In a general sense the use of a correct firm name may be a condition. But the statute carefully enumerates certain original conditions, the violation of which shall impose a general liability. The condition as to the use of the name of the special partner in section 13, and the condition as to publication of notice in section 9, are illustrations. Why should the legislature have made particular mention of these and other failures to comply with the act, and prescribed the penalty of general liability in terms, if it was intended that every failure to follow the precise directions of the statute should be followed by this result. The act should have a fair and reasonable construction, and we think the defect in the present case did not render the proceeding void from the beginning, or impose on the special partner a general liability. (See PECKHAM, J., *Manhattan Co. v. Laimbeer*, 108 N. Y. 582.) By recent legislation the strict policy which prevailed under the original enactment has been departed from. It is now possible to continue the use of a former firm name on the constitution of a new partnership, although the names of those who become special partners in the new firm are found in the

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original firm name. (Laws of 1882, c. 425 ; do. 1893, c. 263.) We are not required in the absence of binding authority to impose a liability upon a special partner upon a technical and severe construction of the statute, not in harmony with legislative policy indicated by recent legislation. A party dealing with a firm having the word "Co." attached to the firm name, would not be likely to give credit on the faith of that addition without knowing who were represented by it. The facts in relation to the organization of the special partnership of W. S. Alley & Co. were matters of public record, and it is not claimed that the names and character of the several co-partners were not posted on the building as required by the act. The case of *Andrews v. Schott* (10 Pa. St. 47), in the Supreme Court of Pennsylvania, which has been followed in some of the other courts in that state, construed a section in the Limited Partnership Act of that state, similar to section 13 of the Revised Statutes in the act of this state. The court got by the difficulty that the legislature had not declared that the use of the word "company" should make the special partner liable as a general partner, by saying, "No doubt the legislature supposed that the latter part of the sentence, 'he shall be a general partner,' referred to the whole section." In this state the section has been frequently amended, and the phraseology upon the point now in question has remained unchanged. The court is not called upon to remedy an inadvertence or omission (if any occurred) in order to impose the penalty of general liability. The conclusion we have reached in this case does not, we think, contravene the statute, while at the same time it is not inconsistent with the present public policy of the state.

The judgment of the General Term and of the Circuit should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

EMMET M. FITCH, as Administrator, etc., Respondent, v.
EDWARD M. McDOWELL et al., Appellants.

A mortgagor gave to the mortgagee a promissory note, which when paid it was agreed should operate as a payment on the bond secured by the mortgage. The mortgagee procured the note to be discounted by a bank, and thereafter assigned the securities. In an action to foreclose the mortgage it appeared that the note remained unpaid in the hands of the bank. *Held*, that the transfer of the note operated as a payment *pro tanto* so long as it remained in the hands of a third party and could not be produced and delivered up by the mortgagee; that the bank, however, took no interest in, or right to, the bond and mortgage; and so, was not entitled to have the amount of the note paid to it out of the proceeds of sale, in preference to the claim of the holder of the mortgage for the balance unpaid thereon; but that, the mortgagor having assented thereto, a judgment was proper directing payment of the note out of any surplus arising on the foreclosure sale.

Reported below, 80 Hun, 297.

(Argued March 19, 1895; decided April 9, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made July 14, 1894, which modified and affirmed as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This was an action for the foreclosure of a mortgage executed by Edward W. McDowell to John H. Whiteside and Timothy Howe, as trustees, and by them assigned to Andrew Williams. In 1886 Williams assigned said mortgage to Jane Ellis, plaintiff's intestate, as collateral security to the extent of \$5,000, which assignment remained in Williams' possession until June 20, 1888, during which period he received payments from McDowell, who believed Williams to be the absolute owner. It was then destroyed and an assignment executed, which transferred absolutely to said Ellis the bond and mortgage in payment of the debt to which the other assignment was collateral. This assignment was recorded October 5, 1888. On January 24, 1888, McDowell delivered to Williams, at his request, a negotiable promissory note for \$1,765, payable in

two months, the amount when paid to apply on the bond and mortgage. This note Williams procured the Iron National Bank to discount before maturity. This note was not paid, and the bank recovered a judgment upon it against Williams and McDowell. The bank and McDowell were made defendants to the foreclosure suit. They both answered, the former claiming it was entitled to the proceeds of the sale and the benefit of the security to pay the amount due on its judgment on the note, and asked that the foreclosure proceed. McDowell claimed the same thing, but also asked that if it should be found that the bank was not entitled to that relief, then that the note and judgment, being an outstanding liability against him in the hands of a third party, the amount thereof should be credited to him as a payment. The trial court directed judgment in favor of plaintiff for the amount due on the mortgage. This judgment was modified by the General Term by allowing McDowell credit for the \$1,765 note, and directing that plaintiff be paid out of the proceeds of sale the amount due less the allowance to McDowell upon said note, and that if there is any surplus, then that the same be applied in payment of the note.

T. F. Conway for appellants. The giving of the note by McDowell to apply on the bond and mortgage when paid, before the assignment to Ellis and its discount by defendant, the Iron National Bank, operated as an assignment of the bond and mortgage to the bank, whether the bank knew of the existence of the securities at the time or not. Therefore, the bank is entitled to be first paid from the proceeds of the mortgage sale, as said note and the judgment procured thereon remained unpaid and owned by it when this suit was commenced and at the time of trial. (Thomas on Mort. § 300; *Parmlee v. Dann*, 23 Barb. 461; *Nelson v. Bright*, 1 Johns. Cas. 205; *Evertson v. Booth*, 19 Johns. 491; *Barclay v. Blodgett*, 5 Cow. 202; *Longdon v. Buel*, 9 Wend. 80; *Betz v. Hubner*, 1 Penn. 280; *Merritt v. Bartholic*, 36 N. Y. 44; *Battle v. Coit*, 26 id. 406; *Hill v. Hoole*, 116 id. 302:

Schaffer v. Riley, 50 id. 61.) The Recording Act does not in any way aid the plaintiff. The record of an assignment of a mortgage does not prevent the mortgagor from making payments legally to the assignor until actual notice be given. (*Green v. Warwick*, 54 N. Y. 227; *Brewster v. Coons*, 103 id. 556; *Thomas on Mort.* § 316; *Gould v. Marsh*, 1 Hun, 556; *Carpenter v. Logan*, 16 Wall. 271; *Morris v. Bacon*, 123 Mass. 58.) Defendant McDowell is in any event entitled to credit on the mortgage to the amount of the \$1,750 note, it and the judgment thereon being an outstanding obligation against him in favor of a third party. (*Battle v. Coit*, 26 N. Y. 406; 4 R. S. 2476, § 41; *Muler v. Scheneck*, 3 Hill, 328.)

L. L. Shedden for respondent. The bond and mortgage, or any part or interest therein, was never assigned to the Iron National Bank. (*Thomas on Mort.* § 392; *Hill v. Beebe*, 13 N. Y. 556-568; *Feldman v. Beier*, 78 id. 293; *J. I. Co. v. Walker*, 76 id. 521; *Tyles v. Yates*, 3 Barb. 222-228; *Gregory v. Thomas*, 20 Wend. 20; *Cole v. Sackett*, 1 Hill, 516; *Carroll v. Sweet*, 128 N. Y. 21.) The assignment to Jane Ellis was a conveyance under the Recording Act. She was a purchaser in good faith for value and thereby obtained a preference over the verbal unrecorded arrangement made between the bank and its president. (*Brown v. Leavit*, 31 N. Y. 113; *P. Ins. Co. v. Church*, 81 id. 218; *Pratt v. Coman*, 37 id. 440; *Mayer v. Herdelboch*, 123 id. 332.) At the time the note was discounted, the bank was not a *bona fide* purchaser of same, as it had knowledge of the prior assignment to Mrs. Ellis. (*Holden v. N. Y. & E. Bank*, 72 N. Y. 286; *Vil. of Port Jervis v. F. N. Bank*, 96 id. 550; *Carrie v. Hadley*, 99 id. 131; *F. Bank v. N. Y. & S. C. Co.*, 4 Paige Ch. 127; *L. S. Bank v. Senecal*, 13 La. 521, 527.)

PECKHAM, J. We think the General Term made a proper disposition of this case. The transfer of the note by Williams to the defendant bank operated as a payment *pro tanto* of the mortgage so long as the note remained in the hands of a

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third party, and in such condition that the mortgagee could not produce and deliver it up on the trial of the foreclosure action. This principle is decided in *Battle v. Coit* (26 N. Y. 404). The bank upon taking the note took no interest in or right to the bond and mortgage. The mortgage was not given to secure the payment of the note, and a transfer of the note to the bank did not operate as an assignment *pro tanto* of the mortgage. The case is not within the principle that the assignee of a debt secured by a mortgage is entitled to the benefit of that security, although ignorant of its existence at the time of the assignment of such debt. The debt in this case which was secured by the mortgage was never assigned to the bank. There was an original debt due from McDowell, the mortgagor, which was thus secured, but the note which he subsequently gave to the mortgagee, and which when paid was to operate as a payment *pro tanto* upon the mortgage, was not the debt which was secured by that mortgage, but was a simple promise in writing to pay a certain sum of money which when paid was to operate as a payment on the mortgage. The disposition made by the General Term provides for a deduction from the full amount otherwise due on the mortgage of the amount of this note, because it is in the hands of the bank and the bank has a judgment upon it and the mortgagee is thus unable to surrender it, and, as between the maker of the note and the mortgagee, the note operates as a payment *pro tanto*. If there is any surplus after paying the amount due on the mortgage, less the amount of the note, that surplus is to be applied, under the decision of the General Term and with the consent of the mortgagor, to the payment of his note in judgment in the hands of the bank. This is all that the bank has any right to demand, and the judgment must, therefore, be affirmed, with costs.

All concur.

Judgment affirmed.

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HUGH J. GRANT, as Receiver, etc., Respondent, v. PATRICK J. WALSH, Appellant.

One who has been induced to part with his property by the fraud of another, under guise of a contract, may, upon discovery of the fraud, rescind the contract and reclaim the property unless it has come into the possession of a *bona fide* holder.

Where the fraud is proved the burden is upon a third party claiming title to show that he is a *bona fide* holder.

Defendant drew a check upon a trust company, payable to his own order, which he indorsed "for deposit," and deposited it to his credit in the M. S. Bank; a half hour thereafter the bank closed its doors and never opened again for business. The check was delivered by the officers of the bank to the St. N. Bank, which was then acting as its clearing house agent. The latter bank on the next day presented the check for payment, which was refused, the drawee having been notified by defendant not to pay it. In an action upon the check the answer alleged the insolvency of the M. S. Bank at the time of the receipt by it of the check; that this was known to its officers; that the check was obtained from defendant by fraud, and that the St. N. Bank knew of such insolvency prior to the time of the deposit of the check by defendant. On the trial defendant offered to prove statements of the officers of the M. S. Bank made the day prior to that of the deposit showing knowledge of its insolvency; this was excluded. *Held*, error; that permitting defendant to make the deposit in reliance upon the supposed solvency of the M. S. Bank, with knowledge on the part of its officers of its insolvency, was a fraud upon him, and this he had a right to establish, and for that purpose the evidence excluded was competent. The court also excluded evidence tending to show that the officers of the St. N. Bank had knowledge of the insolvency before the time of the deposit. *Held*, error.

Grant v. Walsh (81 Hun. 449), reversed.

(Submitted March 20, 1895; decided April 9, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 16, 1894, which overruled defendant's exceptions and ordered judgment in favor of plaintiff upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

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Opinion of the Court, per HAIGHT, J.

Thomas C. Ennever for appellant. The court erred in excluding the testimony tending to show the knowledge on the part of the Madison Square Bank that their bank was insolvent. (*Cragie v. Hadley*, 99 N. Y. 131; 67 id. 598; *Vosburgh v. Diefendorf*, 119 id. 357; *Grocer Bank v. Penfield*, 69 id. 502.) The defendant did not waive his right to have the question of fact submitted to the jury by asking for a direction of the verdict. (*Koehler v. Adler*, 78 N. Y. 287.)

Smith & White for respondent. By defendant indorsing his check "for deposit" to his account, and delivering the same to the Madison Square Bank, according to his usual custom, the bank became the owner of the check, and could confer a perfect title upon its transferee, the St. Nicholas Bank, the original plaintiff in this action. (*M. N. Bank v. Loyd*, 90 N. Y. 530; *Cragie v. Hadley*, 99 id. 133; *A. E. Bank v. Gregg*, 37 Ill. App. 425.) The St. Nicholas Bank was the *bona fide* holder for value of the defendant's check by transfer under the circumstances disclosed by the evidence. (Daniel on Neg. Inst. §§ 769, 1562.) The affirmative defense set up in the answer, namely, that the Madison Square Bank practiced a fraud upon the defendant in accepting the deposit when insolvent, cannot avail the defendant as against the plaintiff in this action. (*M. Bank v. Loyd*, 90 N. Y. 537.) Defendant's remedy, if any, should be an action or proceeding against the Madison Square Bank or its receivers. (*Cragie v. Hadley*, 99 N. Y. 131.) Appellant wholly failed to establish the defense of insolvency and fraud, on the part of the Madison Square Bank, on accepting the deposit of his check on August 8, 1893, and that such insolvency and fraud were known to the St. Nicholas Bank on August 8, 1893, when it received the check, as alleged in defendant's answer. (*People v. S. N. Bank*, 77 Hun, 159.)

HAIGHT, J. This action was brought upon a check drawn by the defendant on the 8th day of August, 1893, upon the Farmers' Loan & Trust Company, payable to his own order

and indorsed by him "for deposit." About 2:30 o'clock in the afternoon of that day he caused the same to be deposited to his credit in the Madison Square Bank, in which bank he then had an account with a balance still standing to his credit. At 3 o'clock of that day the Madison Square Bank closed its doors and never thereafter opened for business. The officers of the Madison Square Bank then caused the check in question with others to be delivered to the St. Nicholas Bank, which was then acting as the clearing house agent of the Madison Square Bank. On the next morning the St. Nicholas Bank caused the check to be presented to the Farmers' Loan & Trust Company for payment, which was refused, the defendant having in the meantime learned of the failure of the Madison Square Bank and notified the Farmers' Loan & Trust Company not to pay it.

The answer of the defendant alleges that at the time of the deposit so made by him in the Madison Square Bank it was hopelessly insolvent, and that that fact was well known to the officers, agents and employees of the bank; that he did not know of its condition, but supposed it to be solvent, and that, in taking his check upon deposit without notifying him of its condition, a fraud was committed upon him. The answer also alleges that the St. Nicholas Bank did not lawfully obtain possession of the check, and is not the owner thereof in good faith or for value; that the St. Nicholas Bank knew, prior to the time of the making of the deposit of the check by the defendant, that the Madison Square Bank was hopelessly insolvent; that such insolvency was known to its officers, and that the check had been obtained from the defendant by fraud.

Upon the trial the plaintiff produced the check, offered it in evidence and rested. The defendant then, after showing the circumstances under which the check was drawn and deposited by him, called as a witness the receiving teller of the Madison Square Bank and asked him the following question: "On August 7th, 1893, or prior thereto, had any of the officers of that bank told you anything about the financial con-

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dition of the bank?" This was objected to by the plaintiff as immaterial and incompetent. The objection was sustained and an exception taken by the defendant. The witness then testified that he did not hear from any person connected with the Madison Square Bank at any time prior to August 7, 1893, that the bank was insolvent and would have to discontinue business. The question was then asked: "Did you on August 7, 1893?" This was objected to as immaterial and incompetent. The objection was sustained and an exception was taken. The discount clerk of the Madison Square Bank was also sworn as a witness for the defendant and asked if he was present at a conversation on the day preceding August 8th, when the directors stated that the bank was busted and that they would have to stop business. This question was also objected to upon the same grounds, excluded and an exception taken. The cashier of the St. Nicholas Bank was also sworn as a witness for the defendant, and testified that he knew Mr. Judson, the bank examiner, and was then questioned as to whether he knew that Mr. Judson had examined the affairs of the Madison Square Bank prior to August 8, 1893, and as to whether he had had a conversation with him relative to the financial condition of the bank prior to that time. Each of which questions was objected to upon the same grounds, excluded and exceptions taken.

At the conclusion of the defendant's evidence the court directed a verdict for the plaintiff for the amount of the check, to which direction an exception was also taken.

We think the rulings alluded to were erroneous and that a new trial is required. It was shown that the Madison Square Bank was insolvent; that an action had been brought against it by the People and judgment entered dissolving it on the ground of insolvency, and appointing a permanent receiver. It is, therefore, apparent that no action could have been maintained upon the check by that bank if, as is claimed, the check was received after the officers of the bank knew of its condition, and of their inability to continue its business. The rule appears to be well settled that one who has been

induced to part with his property by the fraud of another, under guise of a contract, may, upon the discovery of the fraud, rescind the contract and reclaim the property, unless it has come into the possession of a *bona fide* holder.

In *Cragie v. Hadley* (99 N. Y. 131) an action was brought by the plaintiff against the receiver of the First National Bank of Buffalo to recover the amount of a draft deposited with the bank at a time when the managers thereof knew that it was insolvent. It was held that permitting the plaintiff to make the deposit in reliance upon the supposed solvency of the bank was a gross fraud upon the plaintiff, and that the latter was entitled to reclaim the draft or its proceeds.

The same rule was recognized in *Metropolitan National Bank v. Loyd* (90 N. Y. 530-537), but in that case there was no allegation of fraud in the answer, and, consequently, it was held that the evidence offered, tending to show fraud, was properly excluded. In this case, as we have seen, fraud on the part of the officers of the Madison Square Bank is alleged, and it appears to us that the defendant had the right to establish his allegations in this regard, and that they might have been sustained by the evidence excluded.

If the Madison Square Bank fraudulently procured possession of the defendant's check the plaintiff could not recover without showing that the St. Nicholas Bank was a *bona fide* purchaser and holder.

In *Canajoharie National Bank v. Diefendorf* (123 N. Y. 191-206), RUGER, Ch. J., in delivering the opinion of the court, says: "The burden of making out good faith is always upon the party asserting his title as a *bona fide* holder, in a case where the proof shows that the paper has been fraudulently, feloniously or illegally obtained from its maker or owner. Such a party makes out his title by presumptions, until it is impeached by evidence showing the paper had a fraudulent inception, and when this is done the plaintiff can no longer rest upon the presumptions, but must show affirmatively his good faith.

In *Vosburgh v. Diefendorf* (119 N. Y. 357-364), O'BRIEN,

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J., says: "In this state it must be regarded now as a settled rule that when a maker of negotiable paper shows that it has been obtained from him by fraud or duress, a subsequent transferee must, before entitled to recover on it, show that he is a *bona fide* purchaser."

In *First National Bank v. Green* (43 N. Y. 298) it was held that a party suing upon a negotiable note purchased before maturity is presumed, in the first instance, to be a *bona fide* holder, but when the maker has shown that the note was obtained from him under duress, or that he was defrauded of it, the plaintiff would then be required to show under what circumstances and for what value he became the holder. The reason of this rule, as stated by RAPALLO, J., is that "where there is a fraud the presumption is that he who is guilty will part with the note for the purpose of enabling some third party to recover upon it, and such presumption operates against the holder, and it devolves upon him to show that he gave value for it." (*F. & C. Nat. Bank v. Noxon*, 45 N. Y. 762; *Ocean Nat. Bank v. Carll*, 55 id. 440; *Wilson v. Locke*, 58 id. 642; *Nickerson v. Ruger*, 76 id. 279; 2 Greenl. Ev. § 172; *Bailey v. Bidwell*, 13 Mees. & Wes. 73.) If, therefore, the defendant had been permitted to show that a fraud had been practiced upon him by the officers of the Madison Square Bank, the presumption that the St. Nicholas Bank was a *bona fide* holder would no longer obtain, and then the St. Nicholas Bank could not recover without showing that it had received the check without knowledge of the fraud, in the regular course of business, and had paid value therefor. This it has failed to do. Not only has it failed to establish these facts, but the trial court excluded the evidence offered tending to show that its officers had knowledge of the actual condition of the Madison Square Bank and the circumstances under which that bank received the defendant's check.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

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d168	118

GEORGE V. R. LEWIS, as Administrator, etc., Appellant, *v.*
THE PRESIDENT, MANAGERS AND COMPANY OF THE DELA-
WARE AND HUDSON CANAL COMPANY, Respondent.

The fact that a railroad passenger has taken passage on a train which does not stop at the station where he desires to get off does not affect the measure of duty of the railroad company or the degree of protection to which he is entitled against the negligent acts of its servants; while on the train the company owes to him the same duty of protection against negligence as to the other passengers.

In an action to recover damages for the death of plaintiff's intestate, plaintiff's evidence tended to show these facts: L. was a passenger on one of defendant's trains and desired to get off at a station at which the train did not stop; he was advised by the conductor that no stop was to be made there. Before reaching the station the train slowed up and came almost to a stop near a bridge to enable a freight train, approaching on another track, to pass it, as the tracks were too close together on the bridge to allow two trains to pass. The conductor told L. in substance that he would have to get off there, and, as the train would be moving faster soon, he would have to get off quick. L. went to the rear of the car; to one standing there the freight train was not visible. As L. stepped down from the car it gave a jerk, causing him to lose his balance; he fell upon the other track and was killed by the freight train, the engine of which reached the spot just as he fell. *Held* (FINCH, GRAY and HAIGHT, JJ., dissenting), that the evidence was sufficient to require the submission to the jury of the question as to defendant's negligence, and as to contributory negligence on the part of L.; and so, that a non-suit was error; that the evidence justified a finding that L. was induced to leave the train in face of a danger, *i. e.*, the approaching freight train, which caused his death, of which he was not aware, but which must have been known to the conductor, and of which he should have advised L.

Hunter v. C. & S. V. R. R. Co. (112 N. Y. 371; 126 id. 18), distinguished.
Lewis v. Pres., etc., D. & H. C. Co. (80 Hun, 192), reversed.

(Argued March 20, 1895; decided April 9, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made July 14, 1894, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Circuit dismissing the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

James W. Verbeck for appellant. It was not negligence *per se* to attempt to get off the moving train. (*Filer v. N. Y. C. R. R. Co.*, 49 N. Y. 47; *Morrison v. E. R. Co.*, 56 id. 306.) The fact that the train was moving, if at all (although this is not conceded) at the time Lewis was ordered to get off, would make no difference in this case. The moving train did not directly cause the injuries from which Lewis died. (*Weiler v. M. R. Co.*, 53 Hun, 372; *McIntyre v. N. Y. C. R. R. Co.*, 37 N. Y. 287; *Corcoran v. N. Y. E. R. R. Co.*, 19 Hun, 358; *Reid v. Mayor, etc.*, 139 N. Y. 534; *Coleman v. S. A. R. R. Co.*, 114 id. 609; *C. & I. R. R. Co. v. Carper*, 112 Ind. 26; *D., etc., R. R. Co. v. Curtiss*, 23 Wis. 152; *Hanson v. M., etc., R. Co.*, 58 Am. Rep. 162; *Pool v. C., etc., R. W. Co.*, 53 Wis. 657; *Jones v. C., etc., R. Co.*, 42 Minn. 183; *S. L., etc., R. R. Co. v. Cantrell*, 37 Ark. 519; *Filer v. N. Y. C. R. R. Co.*, 49 N. Y. 47.) Contributory negligence is very rarely a question of law. It is only when the evidence is clear and uncontradicted that it becomes a question of law. (*Stackus v. N. Y. C. & H. R. R. R. Co.*, 79 N. Y. 446; *Filer v. N. Y. C. R. R. Co.*, 49 id. 50; *Bucher v. N. Y. C. & H. R. R. R. Co.*, 98 id. 128; *Glushing v. Sharp*, 96 id. 676.)

Lewis E. Carr for respondent. The plaintiff's case failed because there was no evidence of negligence on the part of the defendant. (*Tolman Case*, 98 N. Y. 198, 202; *Cordell Case*, 75 id. 330, 332; *Bennett v. R. R. Co.*, 69 id. 594; *Nolan v. R. R. Co.*, 9 J. & S. 541.) The non-suit was right, because there was a total failure of proof showing the exercise of care on the part of the deceased. On the contrary, the evidence established contributory negligence on his part. (*Tolman v. R. R. Co.*, 98 N. Y. 198; *Hunter v. R. R. Co.*, 126 id. 18; *Solomon v. R. R. Co.*, 103 id. 437; *Kraus v. W. V. R. R. Co.*, 69 Hun, 482; *Davis v. L. V. R. R. Co.*, 64 id. 492.)

O'BRIEN, J. The plaintiff's intestate was killed in an accident on the defendant's railroad, near Central Bridge station, on the 18th of September, 1889. This action was brought upon the theory that the defendant is legally responsible for the injury which resulted in his death. On the trial, and at the close of the plaintiff's case, the learned trial judge granted a motion for a non-suit, to which the plaintiff excepted.

The appeal to this court presents the question whether, upon the proof given, the plaintiff was not entitled to have the case submitted to the jury. The trial court having disposed of the case as presenting only a question of law the judgment must be upheld, if at all, upon the principle that upon no reasonable view or construction of the evidence could the action be maintained. If the proof given was of such a character as to warrant opposing inferences, or to justify different conclusions of fact in the minds of reasonable men, the case was for the jury.

On the day of the accident the deceased, who lived in Schenectady, got on to a train on the defendant's road at Cobleskill, for the purpose of reaching his home, but in order to do that by the regular route it was necessary to change cars at Quaker Street station. It appears that it was what was called a through train, that made no stop at any station between Cobleskill and Albany, but whether the deceased knew it or not when he boarded the train does not conclusively or satisfactorily appear. Before reaching the next station, which was Central Bridge, about three miles further east, the deceased was informed by the conductor that no stop would be made at Quaker Street. After passing the Central Bridge station and reaching a point about a thousand feet west, where a bridge crosses a stream, the train slowed up and, in the language of one of the witnesses, came almost to a stop. The conductor then told the deceased that he would have to get out quick, that the train would not stop at Quaker Street, and would be running faster very soon. The deceased immediately got up from his seat, went to the rear

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of the car and stepping down, had just reached the ground when in some way he lost his balance and was thrown under a freight train passing rapidly in the other direction, close to the train from which he had just landed. The tracks at this point, it seems, are close together, and the reason, apparently, for reducing the speed of the passenger train, till it came almost to a stop, was to enable the freight train going in the other direction to pass it.

There were two witnesses sworn who witnessed the transaction and it will be perhaps best described in their own language. The first one was Tracy, who was evidently traveling with the deceased, and his version is as follows:

"Was acquainted with Moses Lewis in his lifetime; remember September 18, 1889; I was at Cobleskill on that day; saw Mr. Lewis there on that day walking around the streets; afterwards he and I took the train at Cobleskill to go to Quaker Street, and just before we got to Central Bridge the conductor came in and said, 'Tickets,' and Lewis handed him his mileage book; Lewis said, 'Two to Quaker Street;' conductor said, 'I don't think we will stop at Quaker Street;' he took the book and tore out some tickets, and said, 'I will see;' he went on to the other end of the car and came back, and in the meantime Lewis said, 'You have stopped there before;' he said, 'I will see;' he came back in about a minute or so and said, 'We will not stop at Quaker Street; you have got to get off here, and get off here quick; the train will be moving faster soon;' we started and walked to the rear platform; we walked there with a quick step; we walked quick. Lewis was first and got down and took hold of the railing, and stepped off on the right-hand side; as we went to the rear end of the car he turned to the right and took hold of the railing and stepped off, and about the time he stepped off the train gave a sudden jerk and threw him against the rear end, and he seemed to whirl right round over the track and fell in under a freight train; when he got out on the platform I did not see the freight train; it was not in sight."

In response to some direct questions he further stated:

"Q. As Lewis started to get off the train, describe what movements, if any, he made?

"A. After he had hold of the railing, when it gave the jerk, he tried to get back.

"And when Lewis got off the last step the freight train was not visible to me, standing on the rear platform.

"It was the freight train that ran over Lewis; I do not know what part of the train he fell under; I could not see; the engine of the freight train did not get by him before he finally let go; it was not by; it was just there."

This statement was not materially changed on cross-examination, and being re-examined he further said that there was no freight train to be seen when he started to go down the steps. "We were trying to get off on the side where the depot was. Lewis took hold of the railing and was stepping off; the train gave a jerk and that threw him against the railing, and he seemed to hang on for a second and fell down. This was all done in a second; done quicker than you could tell it. When he whirled and fell down that was the first time I saw the freight train."

The other witness, a man named Burns, a passenger on the train, thus describes what took place: "I was at the time in Cobleskill; have heard Mr. Tracy testify as to the accident that occurred near Central Bridge; I remember that occasion; I got on that train at Cobleskill; was going to Albany; got in the rear car; sat on the north side of the car facing the rear end; saw the witness Tracy; he sat next to the window facing me; Lewis sat with him; did not know him at that time; Lewis sat on the outside facing me in the same seat with Tracy.

"Q. Do you remember just before you got to Central Bridge the conductor came through?

"A. I think I can.

"Q. What happened?

"A. The conductor came in for his ticket and this man, Mr. Lewis, took a ticket out of his pocket, or a book; I think it was black, and gave it to the conductor, and the conductor returned it to him again.

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"Lewis said he wanted to get off at Quaker Street to go to Schenectady; the conductor told him to wait a minute, to wait and see, he would come back; something like that, and he returned the book to him, and he put the book in his pocket.

"The conductor went to the rear of the car; then he came back and touched Lewis on the shoulder and told him he would have to get off there before they were going any faster than they were going.

"He got up and went to the rear of the car, and Tracy and four or five men at the rear, I could not tell exactly, and started to get off on the right; the last time the conductor came back he said to Lewis: 'It is going pretty slow now, and it will be going faster, and you better get off now; that is all I have to say about it;' he told him it was a through train and did not stop at Quaker Street; when Lewis and Tracy got to the rear platform I was looking to the rear; looking right at them; they went off at the rear of the car; it was all done in a minute; somebody pulled the bell; before that, when they got out on the platform, the train was just about going, and that is all there was of it; it was not going very fast; as they got out there it began to pull up all of a sudden; it did not stop; it went quicker; the next thing I saw, somebody came and says: 'Now you have got to stop, you have killed a man;' but I could not say who it was; then the train stopped and backed up, and I got off and saw this man lying there with his legs cut off; at the time the conductor spoke to him first, when he came to take his ticket, it seemed to me that the train was just about pulling in pretty fast, but I could not tell how many miles an hour; we had not quite got then to the Central Bridge depot.'"

The judgment below proceeded upon the ground that this testimony was not sufficient to warrant a finding of negligence on the part of the defendant, and that it did show affirmatively that the deceased was chargeable with contributory negligence. Whether the deceased had paid fare as a passenger to some point east of Cobleskill or not is left in some doubt by the testimony. The conductor was not sworn, or

any evidence given in behalf of the defendant. If that was a material fact it should have been passed upon by the jury, as the proof was *prima facie* sufficient for their consideration on that point. But we think it was not material. The most that can be urged by the defendant in this respect is that the deceased was by mistake in the wrong train. But that circumstance did not affect or change the measure of duty which the defendant owed him as a passenger, or the degree of protection to which he was entitled against the negligent acts of the carrier or its servants. It is true that unless he took passage and paid fare to Albany, the next station where the train stopped, he could have been required to leave the train, but while on it the company owed him the same duty of protection against negligence as the other passengers.

One of the questions for our consideration is whether upon the evidence given the jury could have found that the defendant did not perform that duty. It is not very material whether the language of the conductor to the deceased be regarded as a request, a direction, or an advice to leave the train. It might have been understood as a direction. The witnesses differ somewhat as to the words he used, and the construction to be placed upon his language was for the jury if that question was of any importance. The jury could have found that the deceased left the train, not of his own motion or upon his own judgment, but in obedience to the wish and suggestion of the conductor, and, but for what the conductor said to him, he would have remained in the car. The conductor's action must be judged by the circumstances existing at the time. He brought the train almost to a stop while approaching the bridge and the coming freight train, and it could be inferred from the general situation that this was for the purpose of allowing it to pass. The presence of this freight train was an element of danger not necessarily known to the deceased, but which was or should have been known to the conductor. It was the passage of that train at the time the deceased was alighting from the passenger car that caused his death. Had the request, direction or invitation to get off

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been given at some other time or at some other place where the only danger to be feared was that incident to getting off from a train moving at a slow rate of speed, there is no reason to believe that the deceased would have been injured. The deceased was induced to leave the train in the face of a danger which he may not have been aware of, but which must have been known to the conductor. It cannot be said as matter of law upon this evidence that the deceased knew of the approaching train which caused his death or could have seen it in time to avoid the danger. That was a proper question for the jury, but we cannot say that the deceased in the hurry and excitement of the moment and in the suddenness of the emergency either knew or could have known of the danger that awaited him on leaving the car, while the conductor did, or at least the jury could have taken that view of the evidence. Had the conductor stopped the train and requested the deceased to get off at a place where another train was passing at the same time, without warning him of the danger, it would be for the jury to say whether the carrier had used that degree of care which the law exacts of it under such circumstances. So we think that the conduct of the defendant's conductor in this case presented a question for the jury. (*Bucher v. N. Y. C. & H. R. R. Co.*, 98 N. Y. 128; *McIntyre v. N. Y. C. R. R.*, 37 id. 287; *Weiler v. Manhattan Railway Co.*, 53 Hun, 372; *Reid v. Mayor, etc.*, 68 id. 110; 139 N. Y. 534; *Pool v. Chicago, etc., Railway Co.*, 53 Wis. 657; Wharton on Neg. § 371; *Keating v. N. Y. C. & H. R. R. Co.*, 49 N. Y. 673.)

The language of the defendant's servant, whatever its fair construction may be, was calculated and intended to put the deceased in motion, and may be regarded as the moving cause of his attempt to leave the train at the time and place that he did. The conductor, it must be presumed, knew the exact situation, the distance between the tracks which brought the trains close to each other, the presence of the coming freight train and the other elements of danger, if any, to which the deceased would be exposed in leaving the train. If, with

knowledge of the existence of a latent danger, known to him but not to the deceased, he requested or invited him to encounter this danger without informing him of it, or guarding against it, he failed to perform that duty to the passenger which the law requires.

In dealing with the passenger the conductor represented the corporation, and any omission of duty or neglect on his part may be imputed to the defendant.

Nor do we think that the evidence was of such a character as to warrant the learned trial court in deciding that the deceased was, as matter of law, guilty of negligence contributing to the injury resulting in his death. It cannot be affirmed, as a legal result of the evidence, that he was aware of the presence of the approaching freight train, or that, in the hurry and excitement of the moment, he could or ought to have seen it. The evidence on that point is not very clear, but as it appears in the record the question could not properly have been taken from the jury. So far as appears the deceased had no reason to believe when he left his seat in the car that the conductor had invited him to alight from the train at a point where he was liable to encounter another, running at a high rate of speed in an opposite direction, and whether he discovered it on reaching the platform or before alighting was, upon the evidence, a question of fact. In this view the only other ground upon which contributory negligence could have been predicated is the undisputed fact that the deceased attempted to alight from a train while in motion, at a low rate of speed, at the request, direction or suggestion of the conductor. It is urged that negligence on the part of the deceased follows from that fact as a necessary legal inference, irrespective of what the conductor said or of the circumstances under which the passenger acted. This proposition is asserted upon the authority of the *Hunter* case, which was considered in this court upon two occasions (112 N. Y. 371; 126 id. 18). The deceased in that case attempted to board a moving train in the face of a situation and under circumstances attended with peculiar danger. Here the deceased

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attempted to alight from one without being aware, so far as appears, of the presence of the approaching train which caused his death or any other danger except such as was involved in the act itself. The *Hunter* case recognizes a manifest distinction between the case of a passenger getting on and off a moving train. In the latter case the act may be justified or excused by a necessity or what is termed a stress of circumstances that cannot exist in the former. It is not necessary now to point out all the reasons upon which this distinction rests since this court has held upon full consideration that a passenger in attempting to alight from a moving train, under circumstances not unlike those appearing in this case, was not guilty of negligence *per se*, but that the question was one of fact for the jury. (*Filer v. N. Y. C. R. Co.*, 49 N. Y. 47.) The same principle was assumed or decided in some of the other cases above cited.

There is no inflexible rule of law that determines the nature of the act of the deceased in attempting to alight from the train. It must be viewed in the light of the actual situation as it appeared to him and judged by that measure of care and caution which a person of ordinary prudence is expected to observe under like circumstances. The conductor had presented to the mind of the deceased the alternative of leaving the train immediately in order to reach his destination or of being carried out of his way to a distant point. There was but little time for thought or reflection, and whether, under such circumstances, the passenger made a prudent or a reckless choice was a question to be determined by the judgment of reasonable men. He had a right to assume that the conductor would not expose him to any concealed danger from a passing train. Had he been informed of that element of risk he might not have assumed it or might have guarded against it. Whether, under all these circumstances, his conduct was careless or prudent was a question which could not properly be determined by the court, but belonged to the jury.

The judgment must, therefore, be reversed and a new trial granted, costs to abide the event.

FINCH, J. (dissenting). The plaintiff's intestate was crushed under the wheels of a freight train and died from the effect of his injuries. The administrator sued to recover damages, but was non-suited at the trial and the General Term have affirmed the consequent judgment. I think the decision was clearly right and beyond any reasonable criticism.

The intestate boarded the defendant's train at Cobleskill, desiring to go to Schenectady. That he was no stranger to the situation is indicated by two facts. He had a mileage book of the company containing its tickets, which he would not have purchased unless in the frequent habit of passing over the road, and his remark to the conductor about the previous stopping of the same train at Quaker Street indicates his familiarity with its character and his habitual use of it. It was a through train bound to Albany, not scheduled to stop at Quaker Street, and inviting no passengers for that station. This fact the intestate perfectly well knew, and it was his duty to have known it before he went upon the train. What he desired to do was to leave the car at Quaker Street and go by another train direct to Schenectady, instead of following the two sides of the triangle and traveling first to Albany and then to Schenectady, which was the longer and more expensive route. He took the through train, hoping it would stop at Quaker Street, but without any invitation to enter based upon that possibility. He could reach his destination safely by either route, and he simply took his chances of being able to get off at the point which he preferred. He had no right to any such permission, and it is quite obvious that he knew it. The intestate was in the rear car of the train. When the conductor appeared and asked for tickets the intestate gave him his mileage book, saying, "Two for Quaker Street." The deceased was sitting by the side of Tracy, who was a witness for the plaintiff, and gave his testimony with a very commendable fairness and intelligence. It is his evidence that I shall follow for an account of the accident. In answer to intestate's announcement of his proposed destination "conductor said, I don't think we

will stop at Quaker Street; he took the book and tore out some tickets, and said, I will see; he went on to the other end of the car and came back, and, in the meantime, Lewis said, You have stopped there before; he said, I will see; he came back in a minute or so and said, We will not stop at Quaker Street; you have got to get off here and get off quick, the train will be moving faster soon." When this conversation began the train was moving rapidly. When it ended the brakes had been applied and it was moving, very slow, but still in motion. It did not stop at all until after the accident. That is what every witness testifies to except one. He was a Presbyterian minister sitting in a different car from deceased, and with nothing to draw his attention to the precise facts. He said: "The train nearly stopped; I don't know but it did come to a stand-still;" but, on cross-examination, he said: "Am not able to say whether the train came to a stop or not." The uncontradicted evidence, therefore, is that it greatly abated its speed, but was in motion when the accident happened. Tracy's account of the conversation is varied somewhat in its form by the testimony of Burns, who said: "The conductor went to the rear of the car; then he came back and touched Lewis on the shoulder and told him he would have to get off there." The witness stated the conductor's language thus: "It is going pretty slow now, and it will be going faster, and you better get off now; that is all I have to say about it." No other witnesses describe the conversation. It is not easy to misunderstand what was said. It was not a command to leave the train, nor a direction to do so, nor a statement in any manner controlling the free action or free choice of Lewis. It informed him of two facts bearing upon his convenience; one, that the train would not stop at Quaker Street, the other, that, if he chose not to go to Albany, his only opportunity was to get off at once while the train was going slow, and, if he preferred to do that, he must do it quickly, for the train would soon be going faster. Any different construction of the conductor's words would be possible only as a last resort in the technical atmosphere of a law suit.

They simply notified Lewis of an opportunity to be availed of promptly, if at all, and left him to choose between a safe ride to Albany and the experiment of leaving the train while moving slow. Lewis chose to avail himself of the opportunity and get off of the train while its motion was slight. He made this choice, not under a stress of circumstances occasioned by the neglect or wrongful act of the company, which we have sometimes admitted as an excuse, but solely for his own convenience and as the result of his own voluntary act. The company had in no manner created or caused the emergency which occasioned his choice.

It is probable that the train slackened its speed to enable a freight train approaching on the other track to first cross the bridge on which the two tracks were so close together that only one train could pass at a time. The proof does not show whether this was a usual or an exceptional circumstance. If usual, it would be a just inference that the conductor, knowing the place at which the brakes were applied, would infer the approach of a coming train first reaching the bridge. If, however, the express train, as is generally the case, had the right of way and it was the ordinary duty of the freight train to wait on the other side for the express to pass, or the coming train was "belated," as the plaintiff's counsel says, though I see no such proof in the case, or if from any other cause the slackening of speed at that point was exceptional, then it will not follow that the conductor knew, or ought to have known, that the freight train was approaching. The proof permits only of a guess on that point more or less reasonable according to the general knowledge with which one looks at it.

Returning to Tracy's account of the accident, and he is the sole and only witness who saw it and was able to describe it, it appears that he and Lewis both at once arose at the end of the conductor's statement, and came out upon the rear platform of the car. Lewis had in his left hand an umbrella and an overcoat, approached the steps leading to the side of the train, and with his right hand took hold of the iron rail fastened to the body of the car. What then occurred should be repeated in

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Dissenting opinion, per FINCH, J.

the words of the witness. "Lewis was first and got down and took hold of the railing and slipped off on the right-hand side; as we went to the rear end of the car he turned to the right and took hold of the railing and stepped off, and, about the time he stepped off, the train gave a sudden jerk and threw him against the rear end and he seemed to whirl right around over the track and fell in under a freight train;" * * *

"I saw what he had hold of; he had hold of the railing that was on the end of the body of the car; I saw him step down; saw him step off; step down on the ground;" * * *

"When Lewis stepped down that way he had an umbrella and an overcoat in his left hand; when he stepped down I saw his feet strike the ground; his feet did strike the ground; when he stepped on the ground he had hold of the railing of this car; he did not continue to hold on to it more than a second I think; and it was after he had fairly alighted on the ground; the sudden motion of the passenger train I spoke about was just about as he was in the act of stepping off; his feet had not struck the ground then; then after that he stepped down from the step and struck on the ground with both feet fairly, and retained his hold of the railing after that." * * * "I saw him spin around; that was when he was yet holding on the railing; when he was turning round; it was just after that; the jerk of the train came before that, when he was still on the steps; I could not say as to whether the jerk of the train threw him off under that train; it threw him against the rail; I saw him get on the ground with both feet; saw him still hold on the railing with his hand; he was still upright, with his face toward the engine; I noticed that he was moving along in the same direction as the train at that time."

* * * "So far as I observed, when he came out on the platform, Lewis did not make the slightest observation."

* * * "He took hold of the railing and was stepping off, and, as he was stepping off, the train gave a jerk, and that threw him against the railing, and he seemed to hang on for a second and fell down; this was all done in a second; done quicker than you could tell it." That is the whole evidence

of the accident and its cause. It puts an end utterly to the theory that getting off of the moving train had nothing to do with the injury, and shows that it had everything to do with it, and was its sole explanation and cause. We see Lewis at the very last moment with his hold on the train unloosened, pulled along in its direction and spinning round with a fall. The whole thing occupied but a second. In telling it it seems longer, and the effort of the witness to analyze the sudden jerk and whirl makes it appear slower than the almost instantaneous event. That he might have seen the approaching freight train if he had looked; that he might have heard it if he had listened; that he took no observation whatever; that the jerk of his own train threw him off the step, and as his feet struck the ground his hold on the railing swept him from his balance; these are facts, obvious and beyond reasonable question, and which show that the deceased, instead of being free from negligence, met his death from that cause. We have held too often that it is a negligent act for one to get on or off of a moving train to discuss the subject anew, and the only condition which we have ever allowed to make it excusable did not, as I have shown, exist in this case. That excuse, allowed so far to modify the character of the act as to permit a jury to regard it as not necessarily negligent, was first stated in *Filer v. N. Y. Central R. R. Co.* (49 N. Y. 47), in which it was held that where the passenger by the wrongful act of the company is put to an election between leaving the cars while moving slowly or losing the station where he has a right to stop, the question of negligence becomes one of fact. It was not denied that alighting from a moving train was wrong or dangerous, but the decision went upon the ground that the act was not one of free agency, but was the product of coercion produced by the wrongful act of the company. In this case the election was occasioned solely by the fault of Lewis himself. He voluntarily and deliberately put himself in a position where there was but a possible chance of alighting at Quaker Street, and when that chance was gone the choice between leaving

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the train moving slow and going safely to his destination, flowed from his own fault, and was not produced by any wrongful act on the part of the company. A man cannot himself occasion the stress of circumstances under which he chooses, and then put them upon the company as an excuse for a dangerous act. We refused after a deliberate discussion to extend the principle of that rule so as to destroy it, in the case of *Hunter v. C. & S. V. R. R. Co.* (126 N. Y. 18). We there held that the person injured acted as a free agent, that is, not coerced or compelled to choose by any fault or wrongful act of the company, and that his convenience or inconvenience was a matter of no account, and further that the invitation of the conductor did not alter that free agency, or put any sort of coercion upon it. The same thing is true here. I do not regard the words of the conductor as amounting even to an invitation. They furnished a possible alternative having a risk about it which the passenger was free to accept or not, and left him to choose. Between these words, however regarded, and the accident lay the free agency of the passenger, not coerced by the company, and which it had not lessened, warped or controlled by any wrongful act of its own. No responsibility for the choice rested upon it.

Beyond that, we held in the *Filer* case, in spite of the stress of circumstances and the invitation of the train agents, that the passenger was not absolved from prudence and care in alighting from the moving train. We said of the then plaintiff that "if, in leaving the cars, she did not exercise the care and caution which she might and ought to have done, and was careless and negligent in her movements, or in the care of her dress, and by reason of such want of care caused or contributed to the injury, she ought not to recover." Here, not only is no care or caution affirmatively shown, but the absence of it is proved. The passenger put his convenience above his safety. He knew it was risky and unsafe to alight from a moving train; that he was about to take that risk; that another track was alongside warning him of peril from that direction; that a train might pass at any moment and increase

the danger of his intended act, but, instead of exercising a care commensurate with the known danger, Lewis rushed off hastily in the face of the freight train, without making the slightest observation, when he might easily have seen it if he had looked. It is said the conductor should have warned him. But Lewis knew everything except one, and that one he was bound to expect might occur. Possibly the conductor did know that the freight train was approaching, although there is no proof of the fact. It is equally possible that he did not know. He was inside the cars where he could not see and might not have heard; the slowing of the train may have been a common and prescribed act before crossing, and not indicative of an approaching train having a right of way, and the train which did come out of its time, even if the conductor knew what its regular time was. If we are to guess about it, the chance of guessing right is very slender. But what the conductor may have known, the passenger was bound to expect, whether warned or not, and the duty of care and prudence which he did not exercise remained.

These views accord with those expressed in the courts below, and the judgment should be affirmed, with costs.

ANDREWS, Ch. J., PECKHAM and BARTLETT, JJ., concur with O'BRIEN, J., for reversal; GRAY and HAIGHT, JJ., concur with FINCH, J., for affirmance.

Judgment reversed.

MATILDA A. SLOANE, as Executrix, etc., Respondent, v.
WILLIAM R. H. MARTIN, Appellant.

Where the jurisdiction of a Federal court is invoked, with reference to real estate in which an infant has an interest, by proceedings *in rem*, or of that nature, service of process upon the infant is not essential to the attaching of the jurisdiction.

While in such a case the jurisdiction can only be exercised, upon notice to the parties interested, if they have notice in fact, any irregularity, although it may be reversible error, does not necessarily render the judgment void.

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Statement of case.

In an action for the specific performance of a contract between S., plaintiff's testator, and defendant for the purchase by the latter of certain lands to which the former claimed title under a sale by virtue of a judgment in equity of a U. S. Circuit Court, these facts appeared: The action in which said judgment was rendered was brought by judgment creditors of a partnership to reach the real estate, the title to which was in the name of one or more of the co-partners, but which plaintiff claimed belonged to and was held in trust for the firm. The infant children of G., a deceased member of the firm, were made a party, but were not personally served with process. In the action in which the creditors obtained their judgment an attachment was issued which was levied upon the land in question. The judgment asked in the equity suit was that the land be declared partnership property and that it be sold to pay plaintiff's judgment. A *lis pendens* was filed therein. On petition of the mother of the infants a guardian *ad litem* was appointed and a solicitor appeared for them. Judgment was rendered granting the relief sought. The purchaser on sale in pursuance thereof refused to take the title tendered, and on motion to compel him so to do the court held the title good. *Held*, that the decision, it not appearing that it was contrary to other decisions of the Federal courts, should be followed here; and so, that a judgment in favor of plaintiff was proper.

Woolridge v. McKenna (8 Fed. Rep. 650); *Bank of U. S. v. Ritchie* (8 Pet. 128); *O'Hara v. MacConnell* (93 U. S. 150); *N. Y. Life Ins. Co. v. Bangs* (108 U. S. 435), distinguished.

Reported below, 77 Hun, 249.

(Argued March 14, 1895; decided April 9, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made the first Monday of March, 1894, which affirmed a final and an interlocutory judgment in favor of plaintiff entered upon the report of a referee.

This was an action for the specific performance of a contract for the purchase of real estate, and arose out of defendant's refusal to complete his purchase on the ground that the title was not good and marketable, George Sloane, plaintiff's testator, having derived title to the larger part of the premises in question through a judicial sale under a decree of the Circuit Court of the United States for the southern district of New York in an action in equity wherein certain infants were defendants. The defect claimed was that said infants were

not served with process. On petition of their mother a guardian *ad litem* for the infants was appointed and a solicitor appeared for them.

The further material facts in reference thereto are stated in the opinion.

William G. Choate for appellant. Under the laws of the United States, as they existed in 1868, the court could not acquire jurisdiction over the persons of the infants without service upon them in the mode prescribed by the equity rules of the Supreme Court of the subpoena issued upon the complainant's bill. (*Ingersoll v. Mangam*, 84 N. Y. 622; Code Civ. Pro. §§ 424, 426, 471; *Seymour v. P. Co.*, 7 Biss. 460; *Story v. Livingston*, 13 Pet. 368; *Cameron v. McRoberts*, 3 Wheat. 591; *Shields v. Barrows*, 17 How. 130; *Russell v. Clark*, 7 Cranch, 98; *R. Co. v. McBride*, 141 U. S. 131.) An infant of four years of age cannot enter a voluntary appearance by an attorney or solicitor, and it cannot, therefore, be held in this case that the proceeding here questioned derives any force or validity from the appearance of Mr. Lane as solicitor for the infants, which preceded the petition of the mother for the appointment of a guardian *ad litem*. (*Cookson v. Lee*, 15 Sim. 303; *Wood v. Longsdon*, 9 Hare App. 26; *Lloyd v. Rossmore*, 9 Irish Rep. [Eq.] 488; *Fox-twist v. Tremaine*, 2 Saund. 212; *Bird v. Pegg*, 5 B. & A. 418; *Colt v. Colt*, 111 U. S. 578; *Sliver v. Shelbach*, 1 Dall. 165; *Bryan v. Kennett*, 113 U. S. 196; *Robinson v. Fair*, 128 id. 53; *Ingersoll v. Mangam*, 84 N. Y. 622.) The mother had no authority to enter an appearance for the infants or to authorize a solicitor to enter such appearance and thereby give the court jurisdiction. (*Greenman v. Harvey*, 53 Ill. 386; *Dickson v. Dickson*, 124 id. 483; *Crocker v. Smith*, 10 Ill. App. 376, 379; *Fitch v. Cornell*, 1 Sawy. 156, 172; *Payne v. Masek*, 114 Mo. 631, 636; *Ingersoll v. Mangam*, 84 N. Y. 622; *Ins. Co. v. Bangs*, 103 U. S. 435; *Chouteau v. Gibson*, 39 Mo. 537, 565; *Campbell v. G. Co.*, 84 id. 352, 366.)

Charles I. McBurney for respondent. The Circuit Court had jurisdiction of these infants. (Code Civ. Pro. §§ 416, 471; *Jensma v. Phiel*, 9 Ves. 355; *Lingren v. Lingren*, 7 Beav. 66; *Smith v. Palmer*, 3 id. 10; *Nixon v. Few*, 7 id. 349; *Stillwell v. Blair*, 13 Sim. 399; *Anonymous*, 18 Jurist, 770; *Lapping v. Howard*, 10 id. 629; *Piddocks v. Smith*, 15 id. 1120; *Kyan v. Galli*, 12 L. J. [N. S.] 72; *Egremont v. Egremont*, 2 De G., M. & G. 730; *Baker v. Holmes*, 1 Dickens, 18; *Garnum v. Marfbal*, Id. 77; *U. S. v. Ritchie*, 8 Pet. 128; *Ins. Co. v. Bangs*, 103 U. S. 435; *Preston v. Dunn*, 25 Ala. 507; *Robb v. Lessees of Irwin*, 15 Ohio, 689; *Gronfier v. Puymiol*, 19 Cal. 629; *Ingersoll v. Mangam*, 84 N. Y. 627; *Crogham v. Livingston*, 17 id. 218; *Gotendorf v. Goldschmidt*, 83 id. 110.) The failure to serve the subpoena on the infants Goodridge, if no service upon them was made, was at most an error or irregularity in practice, and the decree rendered after the appearance of the infants by attorney, the appointment of a guardian, upon the petition of their mother and natural guardian, to represent and act for them, and his answer and defense on their behalf was not void. If this is so, if the decree is not void, but at most reversible for error, it was sufficient to pass a good title to the property in question to a purchaser who bought upon the faith of its validity. The title of such a purchaser would not be affected by a subsequent reversal or vacation of such a decree. (*Voorhees v. Bank of U. S.*, 10 Pet. 474; *Rorer on Judicial Sales*, § 576.)

FINCH, J. The very elaborate and exhaustive opinion of the learned referee, before whom this action was tried, so states the argument upon the fundamental question involved as to simplify our duty of review and enable us to narrow the discussion, which has taken a wide range, to the single ground on which our decision should rest. The jurisdiction assailed is that of a Federal court over infants not served with process, but for whom an appearance was entered and a guardian *ad litem* appointed, who defended in their behalf. The question thus is one of Federal jurisdiction and practice, taking us away

from our own procedure and into somewhat unfamiliar territory, and where the decisions of the United States courts should be our authority and guide. The precise question involved came before one of those courts and was decided in favor of the validity of the judgment. The decision has not been reported and does not appear in the books, but what it was the record before us distinctly and accurately shows. The action was brought in equity in the Circuit Court by Drake and others against Goodridge and others, among whom, named as defendants, were the infant children of Goodridge. The plaintiffs alleged in brief that they were creditors of the co-partnership of Goodridge & Co., and had obtained judgment for specified amounts; that in such actions attachments had been issued and duly levied upon the land here in controversy; that the legal title stood in the individual name of one or more of the partners, but was in truth held in trust for the firm to which it actually belonged, and asked judgment that the land be declared to be partnership property, and that a receiver be appointed to sell it and apply the proceeds to the payment of plaintiff's debt. Judgment was rendered to that effect, and, in pursuance of its directions, the receiver sold the land at a judicial sale. The purchasers thereafter refused to take the title tendered, alleging it to be defective and not marketable. Thereupon the receiver presented a petition to the court setting forth the facts, and praying that the purchasers be required to accept the deed and pay the purchase price. For the purposes of the motion it was stipulated, among other things, that the infant defendants were not in fact served with a subpoena or other process. Judge BLATCHFORD, before whom the judgment had been obtained, decided that the title proffered was good, and the purchasers were bound to accept it. Deciding thus, with the stipulation before him, he necessarily ruled that the court obtained jurisdiction even though there had been no actual service of process upon the infants, but instead merely the appointment of a guardian *ad litem* upon the petition of their mother. What we are now asked to do is to disregard that

decision and hold it to be erroneous, upon a presentation of the same question, founded upon the same alleged defect in the same judgment, and affecting the same land. I am very sure we ought not to do that unless upon some strong and clear conviction that the Circuit Court went astray and in opposition to the decided and manifest trend of Federal authority. It is to that inquiry that the learned counsel for the appellant has addressed himself in an extremely able argument.

His principal reliance is upon the case of *Woolridge v. McKenna* (8 Fed. Rep. 650), decided by Judge HAMMOND in the Circuit Court of the western district of Tennessee. If I regarded the language of the decision as applicable, or intended to be applicable, to a case like the present, where, instead of a mere personal action against infants, we have one in the nature of a suit *in rem*, prosecuted against property in which they had or claimed an interest, seeking to impress upon it a partnership character and devote it to the discharge of the partnership debts, I should feel bound to admit that it held service upon the infants to be imperative, without which the application of the mother and consequent appointment of a guardian *ad litem* would be ineffectual to confer jurisdiction. But I observe that the learned judge himself drew the distinction between the two classes of cases, and held the one at his bar to be a personal action against the infants. I am not sure that he was entirely right in so holding, but that for the present is an immaterial inquiry. He did so hold, and I think intended to confine his ruling to the class of cases in which he ranked the one before him. Speaking of the character of the action, he said: "It is rather in the nature of a personal suit against her to cancel as void the deeds under which she claims than a proceeding against the land." After some further argument, he says again: "If this were a case originally brought in this court, standing as to parties in the shape it now does, there is no doubt whatever that this infant defendant, like all other defendants, assuming that she is a citizen of Kentucky, would have to be

sued in the district of her residence, so that process could be personally served on her, if the case is to be treated as a personal action to cancel the deeds of conveyance." He had already said that it should be so treated, and, therefore, was correct in the assertion that she would have to be sued in the district of her residence, irrespective of the possible fact that the land itself might be in another district, and in holding that personal service was required. He then proceeds thus: "Or if it be a suit *in rem*, or of that nature, against the land, there might be substituted process under the act of March 3d, 1875, which is understood to dispense with the requirement of personal service as well in the case of infants as other defendants." Here again the distinction between the two classes of cases is recognized, and when it is finally held that actual service is essential to the jurisdiction the ruling must relate to merely personal actions such as the one before the court was assumed to be. It, therefore, decides nothing as to the necessary mode of obtaining jurisdiction in a suit against the land. If what is said as to such an action permits an inference that where there is no service on the infants the only other mode of obtaining jurisdiction is under the act of 1875, there are three answers to be made. First. The opinion does not so declare. The reference to the act of 1875 grows out of the non-residence of the infant in the district of the litigation, and assumes the necessity of making her a party against her will or without movement or intervention on the part of her natural guardian. Second. If the opinion had so declared, the statement would have been *obiter*, because relating to a class of cases not before the court; and, third, in that event the decision would stand wholly and entirely unsupported by the authorities cited to sustain it. If on examining them it shall become apparent that, so far as they are applicable at all, they do sustain the court in holding that actual service on the infants is imperative in a merely personal action, but do not support the decision, indeed tend to contradict and overthrow it, if regarded as applicable to a suit against the land, we shall be bound to understand the learned judge as I

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think he meant to be understood and not put upon him a decision which he did not need or undertake to make.

The first case which he cites is *Bank of the U. S. v. Ritchie* (8 Pet. 128). That was a bill of review and a direct attack upon a judgment decreeing the sale of property in which infants had an interest. It did not appear that process had been served upon them. It did appear that a stranger had been appointed guardian *ad litem*, on the motion of counsel for the plaintiffs, without bringing the minors into court or issuing a commission for the purpose of making the appointment. As to that, Chief Justice MARSHALL said: "It is not error, but is calculated to awaken attention." After pointing out other defects in the procedure, he affirms the reversal of the decree, citing many departures from correct usage, but never once intimating that the judgment was absolutely void for want of actual service of process on the infants. It is inconceivable that so great a jurist should have overlooked such a defect if he so regarded it at all. The learned counsel for the appellant perhaps weakens the suggestion by an explanation that something in the law of Maryland following the cession of the District of Columbia may have saved the jurisdiction. I do not know how that is, but obviously the authority, if not positively adverse, does not support the decision of Judge HAMMOND as the appellant would construe it.

The second case cited is *O'Hara v. MacConnell* (93 U. S. 150). That was a case in which the assignees of the bankrupt sued to set aside his conveyance as fraudulent against creditors, making his wife, who was an infant, a party defendant. The subpoena was served only on the husband, but that was held sufficient before 1874, while yet it was decided that the decree should be reversed because no appearance for the wife had been entered and no guardian *ad litem* had been appointed. The reversal was for the lack of the very steps which were taken in the judgment assailed on this appeal. The case, therefore, does not sustain the doctrine for which it is claimed to have been cited.

The third case cited is *N. Y. Life Ins. Co. v. Bangs* (103 U. S. 435). The question involved was the validity of a judgment pleaded as a defense, and it was adjudged void as against an infant not actually served with process, although a guardian *ad litem* had been appointed and had answered. But the court specially point out with constant reiteration the character of the action as having been purely personal. It is said that the infant had no property in Michigan; that the suit did not concern any property, real or personal, and that it was brought to cancel a contract of insurance made with the infant's father. Then it was added that "In all cases brought to enforce or cancel personal contracts, or to recover damages for their violation, the statute requires a personal service of process upon the defendants or their voluntary appearance." So far it is clear that the case is authority for the doctrine, in support of which Judge HAMMOND cited it, that is, as applicable to personal actions, but not at all to the opinion imputed to him as covering also actions in the nature of a proceeding *in rem*. But the opinion cited goes further. The attention of the court was called to three cases which held that non-service upon the infant did not render the judgment void where a guardian *ad litem* had been appointed. It is important to observe the attitude of the court towards these cases. They are in no respect criticised or even doubted, but, on the contrary, are said to be consistent with the doctrine asserted. One by one their facts are developed, and it is shown that the actions were in the nature of suits *in rem*, and then the court added that there was nothing in them inconsistent with the doctrine asserted as applicable to a case which did not touch any property in the district, but to one brought to cancel a personal contract. I think this case fairly holds that the need of service on the infant exists in personal actions, but does not exist in those *quasi in rem*.

There is still another case cited by Judge HAMMOND, which is *Carrington v. Brents* (1 McL. 174). Speaking of a judgment obtained by Carrington, the court said: "It does not appear that in the above suit process was served on the infant,

nor that the guardian *ad litem* was appointed by the court, and for these omissions or errors in the proceedings the decree might be reversed by an appellate court; but when the decree is used as matter of evidence it cannot be disregarded or treated as a nullity."

This examination of the cases cited by Judge HAMMOND makes it very clear, I think, that the rule which he formulated was a rule applicable only to personal actions, and that he did not at all intend or contemplate its extension beyond those. The difference between the two classes of cases was clearly noted in *Mohr v. Manierre* (101 U. S. 422). In discussing the mode in which the Federal courts acquired jurisdiction Mr. Justice FIELD said: "This necessarily depended upon the nature of the subject upon which the judicial power was called to act. If it was invoked against the person to enforce a liability, the personal citation of the defendant, or his voluntary appearance, was required. If it was called into exercise with reference to real property by proceedings *in rem* or of that nature, a different mode of procedure was usually necessary, such as a seizure of the property with notice by publication or otherwise to parties having interests which might be affected." He proceeds to say that these rules were "part of the general law of the land," and were to be applied by the courts of the United States. The words of the learned jurist indicate to my mind what is the vital difference between the two classes of cases, and the distinctive directions in which we should approach the question of jurisdiction. In the case of merely personal actions there is no possible ground upon which that jurisdiction can attach except the service of process upon the individual. The court must lay hold of him. In suits *in rem* it may lay hold of the land, aided as in this case by an attachment and *lis pendens*, and thereby the jurisdiction may attach, but can only be exercised upon notice to the parties interested. If they have that notice in fact, any irregularity in giving it may, indeed, be reversible error, but does not necessarily render the subsequent judgment void.

A similar, though not the same, distinction runs through

our cases in this state. On the one hand we held in *Ingersoll v. Mangam* (84 N. Y. 622), by force of an explicit statute, that in foreclosure actions service of the summons must precede the appointment of a guardian *ad litem*; while, on the other hand, in an action of partition which that statute did not govern, we also held that such precedent service was not essential to the jurisdiction. (*Gotendorf v. Goldschmidt*, 83 N. Y. 110.)

It seems to me, upon this review of the subject, that the decision of Mr. Justice BLATCHFORD pronouncing the title good under the judgment authorizing the sale is not contradicted and not even made doubtful by the other Federal authorities, but that, on the contrary, their manifest drift is toward the result reached by that decision. I think, therefore, we ought to follow it, and that, if it is to be overruled at all, it should meet that fate, not at our hands, but from the ultimate Federal tribunal, carefully considering the nature and limits of its own jurisdiction.

I have said nothing of the rules of the United States court, because I do not think that they at all settle the question or bear very seriously upon the argument, and also because they have been sufficiently discussed in the report of the referee. Nor have I adverted to the position sustained by him and adopted by the General Term that the jurisdiction is saved by the presumptions which attach to the judgment in view of the condition of the record; not because I disapprove of the conclusion which has been reached, but because I think we ought to put our decision upon the ground which I have already stated.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

In the Matter of the Judicial Settlement of the Accounts of
GEORGE S. YOUNG, as Executor, etc.

H. by his will gave to his wife the use of his dwelling house until his farm should be sold. It directed a sale of the farm as soon after his decease as it could be done without undue sacrifice, and a reservation out of the proceeds of the sale of \$4,000 for the use of his wife during life, the same after her decease to be divided among his three children. The testator then gave to his children, within one year after the aforesaid sale of real estate and the reservation for the use of the wife, the whole of the balance of his property. Debts owing by the children were referred to as a part of their inheritance. One of the children died during the lifetime of the widow. In an action for the construction of the will, *held*, that the intent of the testator was to give to the children all of his estate except that given to the wife, and so it covered the trust fund as a remainder; that at his death the title vested in the three children, and the share of the one who died passed upon her death to her representatives.

Reported below, 78 Hun, 521.

(Argued March 21, 1895; decided April 9, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made June 20, 1894, which affirmed a judgment judicially settling the accounts of the executors of Amos Hurlbutt, deceased, entered upon a decree of the surrogate of the county of Cayuga.

The proceeding involved a construction of certain provisions of the will of said Amos Hurlbutt, the substance of which is set forth in the opinion.

S. Edwin Day for appellant. As Mary Tift died before her mother, Mary Hurlbutt, widow of testator, the interest which, otherwise, the former would have taken in the \$4,000, part of the price of real estate to be sold after testator's death, and mentioned in the second clause of the will, lapsed. (*Delaney v. McCormack*, 88 N. Y. 174, 183; *Delafield v. Shipman*, 103 id. 463; *Smith v. Edwards*, 88 id. 92, 106; *Teed v. Morton*, 60 id. 502; *Vincent v. Newhouse*, 83 id.

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505, 511; *Shipman v. Rollins*, 98 id. 311, 324; *Marson v. Purdy*, 9 N. Y. Supp. 579; 126 N. Y. 667; *In re Cameron's Estate*, 27 N. Y. Supp. 1031.) It clearly appears from the will itself that the testator did not intend that the interest of the children in the \$4,000 should vest at once, but did intend the contrary. (*Knox v. Jones*, 47 N. Y. 389; *Robert v. Corning*, 89 id. 225; *Underwood v. Curtis*, 127 id. 523; *Cochrane v. Schell*, 140 id. 516.) The testator died intestate as to the share that Mary Tift would have taken in the \$4,000 had she lived longer than her mother, and it passed to the widow and the surviving children — one-third to the widow and two-thirds to Amos J., Ellen Close and Mary Tift, in equal portions. (*Kerr v. Dougherty*, 79 N. Y. 327.) The appeal is properly taken from the order. (112 N. Y. 525; 99 id. 74.)

Newman & Blood for respondent. The interest of Amos J. Hurlbutt, Mary Tift and Ellen Close in the \$4,000 reserved vested at once upon the death of the testator. (*In re Seebeck*, 140 N. Y. 241; *McKinstry v. Sanders*, 58 id. 622; *Embury v. Sheldon*, 68 id. 227; *Smith v. Edwards*, 88 id. 105; *Leeming v. Sherratt*, 2 Hare, 14; *Campbell v. Stokes*, 142 N. Y. 23; *Miller v. Gilbert*, 144 id. 68; *Goebel v. Wolf*, 113 id. 405; *Vincent v. Newhouse*, 83 id. 511; *Griffin v. Shepard*, 124 id. 70.) Even though there be no other gift than in the direction to pay or distribute *in futuro*, yet if such payment or distribution appear to be postponed for the convenience of the fund or property, the vesting will not be deferred until the period in question. (*Jarman on Wills*, 798; *In re Jennings*, 15 N. Y. S. R. 807.) The fact that the testator directs the sale of his farm "as soon after my decease as it can be done without undue sacrifice," does not except this case from the operation of the rule that an unqualified and peremptory direction operates as a conversion of the real estate into personalty from the time of the death of the testator. (*Fisher v. Banta*, 66 N. Y. 468; *Lent v. Howard*, 89 id. 169; *Betts v. Betts*, 4 Abb. [N. C.] 317, 386; *Bowditch v. Ayrault*, 138 N. Y. 222.)

FINCH, J. The controversy over the construction of this will arises out of the provisions contained in its second paragraph. The testator first gave to his wife five thousand dollars and his household goods, the use of his house until the farm should be sold, and an annuity of one hundred dollars from its rents, issues and profits until that sale should take place. He then provided thus: "Second: I hereby ordain and require the sale of my farm as soon after my decease as it can be done without undue sacrifice, and out of the proceeds of such sale four thousand dollars are to be reserved for the use of my aforesaid wife in the purchase of another home; or, if she shall choose not to so purchase, or choose a place of less value, then the whole of the money or balance left after purchase shall be placed at interest, and the profits arising therefrom shall be hers during life, and after her decease this amount of four thousand dollars, or the premises my said wife may purchase, with any balance of money left after purchase, shall, after her decease, be equally divided among my children, Amos J. Hurlbutt, Mary Tift and Ellen Close." It has happened that the daughter Mary died in the lifetime of the widow, and as a consequence it is claimed by the appellant that the bequest to her lapsed because it was only to vest upon the death of her mother; while on the other side it is contended that the legacy of the principal sum vested at once upon the death of the testator, and so at the death of Mary passed to her representatives. Both sides appear to agree that the imperative direction to sell the farm worked an equitable conversion which requires us to treat the subject of the gift as personal property. Both parties also appear to concur in the theory that the executors became trustees of the fund for the life of the widow, and that while no express trust was in terms created, one should be implied to enable the executors to perform the duties imposed. That is not an unreasonable construction, but whether it be correct, or the widow took a legal estate for life in the fund, we need not now inquire, for in either case the principal of the fund remains undisposed of by the terms of

the second paragraph except so far as involved in the direction with which it concludes, requiring an equal division among the three children after the decease of their mother. It is upon that form of the gift, of the principal, which is in substance the remainder after the life estate, that the appellant takes his stand, invoking the application of the rule that where there is no gift and no language importing such gift except in the direction to convert the real estate into money and then make distribution, the vesting is postponed because time is annexed to the substance of the gift. (*Delaney v. McCormack*, 88 N. Y. 174.) We have steadily maintained that the rule referred to is not inflexible or arbitrary, and is to be applied in subordination to the testamentary intention, and not as destructive of it. (*Smith v. Edwards*, 88 N. Y. 105; *Bowditch v. Ayrault*, 138 id. 229; *Campbell v. Stokes*, 142 id. 29; *Miller v. Gilbert*, 144 id. 73.) In the present case we must, therefore, take into account the other provisions of the will and the general purpose deducible from its terms, and in that process our attention is at once directed to the gift which immediately follows the disputed clause and which forms the third paragraph of the will. It reads thus: "I give to my children, Amos J. Hurlbutt, Mary Tift and Ellen Close, within one year after the aforesaid sale of real estate and the reservation of the aforesaid four thousand dollars for the use of my wife, the whole of the balance of my property not hereinbefore devised, to be equally divided between them," and then speaks of debts owing by them as being "part of their inheritance." The obvious meaning of the testator is that he gives everything to his children except what he had already given to his wife. If the two clauses are read together, as they should be, their manifest purport becomes a gift of all the property to the children except that previously devised to the wife, the enjoyment of the four thousand dollars being postponed to her decease. The gift is broad enough to cover the trust fund as a remainder and would have done so without the least doubt if there had been no previous direction to divide. It

would have been the only gift made and have prevented intestacy as to the four thousand dollars. That being so we are bound to regard the direction as to division not as a gift, not as something "hereinbefore devised," but as a postponement of the possession of what by the third clause is fully and absolutely given. That clause carried the principal of the fund to the children, and the provision for payment in one year related to the whole gift except as necessarily limited by the necessities of the previous creation of the trust fund. This view is strengthened by the description of the gift to his children as "their inheritance," and by his later provision for Ellen in which he seeks to guard "the property set apart to her" from the control of her husband, and still further by the fact that a postponement of the actual distribution was essential to the operation of the precedent life estate of the widow, and that no uncertain contingency clouded the gift to the children.

The learned counsel for the appellant argues that time entered into the substance of the gift, because the thing given was the money and not the land, and as money it had not even come into existence at the death of the testator. But the equitable conversion, where a sale is imperative and dependent upon no contingency, dates from the death of the testator, and if, disregarding that date and placing the conversion at the actual sale, we undertake to scan the situation we shall see that the farm itself and its whole rents and profits, subject only to the widow's use and the annuity of one hundred dollars, vested at once in the three children, and would have stayed there and remained there now if the power of sale had not been executed. Time may fairly be said to enter into the substance of a gift when the existence of such a gift depends upon a contingency which may or may not happen, but where the only contingency is a death certain to occur and the legatees are known and fixed, it is more natural to regard a postponed division as relating to the period of actual enjoyment, where there are other words in the will evincing an intent to make the gift. It is quite evident in this case

that the postponement of the distribution was to let in the interest of the widow (*Loder v. Hatfield*, 71 N. Y. 100), and enable her to receive the income of the fund during her life. We think, therefore, that the legacy to Mary vested at the death of the testator.

The judgment should be affirmed, with costs.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

145	540
168	408

In the Matter of the Estate of SAMUEL C. HARRIOT,
Deceased.

An order of a Surrogate's Court fixing the fees of appraisers of the estate of a deceased testator is a final order affecting a substantial right, and so is appealable to the General Term and to this court. (Code Civ. Pro. §§ 2570, 190.)

The N. Y. L. I. & T. Co., as executor of the will of H., commenced an action to have its accounts as such settled. The legatees under the will objected to items in the account stated to have been paid the appraisers of the estate for their services; these had not been verified by affidavit of the executor and adjusted by the surrogate before payment as prescribed by the statute then in force. (Chap. 225, Laws of 1873; see, also, Code Civ. Pro. § 2711, as amended in 1893.) Pending the trial of the action before a referee, the executor, upon affidavits of the appraisers and their stipulation as attorneys for the executor, procured an order from the surrogate taxing their fees at \$250 each. The legatees, under the will, thereupon, upon notice to the executor and appraisers, moved for an order vacating the order taxing said fees, which motion was denied, and the surrogate's order was affirmed by the General Term. *Held*, that the legatees had the right to make the motion, and that the orders below were reviewable here.

Appraisers are officers of the court, and the amount of their fees being fixed by statute (Code Civ. Pro. § 2565), they have no right to demand or receive more than the statute allows, however large the estate may be, unless the parties interested consent.

It appeared by the affidavits upon which the motion to vacate was made that the estate, aside from household furniture and items of cash on hand, consisted of twenty-seven different items of corporate stock and other securities; that the counsel for the legatees filled out the inventory, except as to the securities and cash, and this part was prepared by the executor; that the furniture was appraised in a lump sum, and the appraisers had

nothing to do in regard thereto save to see that the furniture was in the house; that the value of the securities could have been ascertained in a single day's time. No affidavits were read in opposition. The surrogate, however, took into consideration the affidavits of the appraisers used on the original motion, which, without giving any items, stated generally that each of them had actually and necessarily been employed more than fifty days. The surrogate so found. *Held*, that the facts did not justify the finding, and that the order denying the motion to vacate was error.

(Argued March 21, 1895; decided April 9, 1895.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made October 12, 1894, which affirmed an order of the Surrogate's Court of the county of New York denying a motion to vacate and set aside an *ex parte* order of said surrogate fixing the compensation of two appraisers of the estate of Samuel C. Harriot, deceased.

The facts, so far as material, are stated in the opinion.

A. C. Brown for appellants. The order of the General Term is appealable to this court. (Code Civ. Pro. §§ 190, 2570, 3333, 3334; *Seaman v. Whitehead*, 78 N. Y. 306.) The surrogate had no jurisdiction to make the *ex parte* order. (Laws of 1893, chap. 686; *Bevan v. Cooper*, 72 N. Y. 317, 327; *Seaman v. Whitehead*, 78 id. 306, 308; *Sanders v. Soutter*, 126 id. 193, 200.) If the surrogate had jurisdiction to make an order fixing compensation in this case, and was authorized to exercise the discretion reposed in him by the act of 1873, and the provisions of the Code, the order made, and affirmed after a motion on all the facts to vacate it, was such a gross abuse of that discretion as to amount to reviewable error. (Code Civ. Pro. §§ 2565, 2711; *People v. Common Council*, 78 N. Y. 56, 61; *La Beau v. People*, 34 id. 223, 233; *Granger v. Craig*, 85 id. 619; *Atty.-Gen. v. N. A. L. Ins. Co.*, 93 id. 387, 390.) The orders of the General Term and of the Surrogate's Court should be reversed and that of the surrogate vacated. (*In re De Pierris*, 79 Hun, 279.)

R. E. Robinson for respondent. The appellants had no standing in the court as moving parties. (Code Civ. Pro. §§ 2565, 2711.) These appellants have no right of appeal from the order here appealed from. A stranger to an action has no right of appeal from an order denying his application for relief against proceedings in such action. (*In re Bristol*, 16 Abb. 397; 42 Barb. 274; 1 Redf. 1; *Id.* 130; 25 N. Y. 9.)

HAIGHT, J. It appears that the New York Life Insurance and Trust Company had been appointed the executor under the last will and testament of Samuel C. Harriot, deceased, and as such had commenced an action in the Supreme Court to have its accounts as such executor adjusted and settled; that objections had been taken by the appellants to certain items of the account presented by the executor, among which was an objection to the items paid to the appraisers for their services; that thereupon a reference was ordered to hear and determine the matters in controversy, and pending the hearing before the referee the attorneys for the executor appeared before the surrogate, and upon the affidavits of the appraisers and their own stipulation as the attorneys for the executor procured an order taxing the fees of the appraisers at the sum of \$250 each. The order so procured from the surrogate was then introduced in evidence before the referee. Thereupon the appellants, upon notice to the executor and the appraisers, moved in the Surrogate's Court for an order vacating the order taxing the fees of the appraisers, which motion was denied. This order having been affirmed in the General Term is now brought to this court for review.

It is contended on behalf of the executor that the appellants had no standing in the Surrogate's Court; that they were not entitled to notice of the application to tax the appraisers' fees, and that consequently they had no right of appeal to review the order there made. We are unwilling to adopt this view. The appellants are the parties interested and finally have to bear the burden of the expenses incurred by the executor. The order was a final order and affects a substantial right.

An appeal from such an order is authorized by sections 2570 and 190 of the Code of Civil Procedure. Ordinarily it may not be necessary for the next of kin or legatees to have notice of the taxation of the fees of the appraiser by the surrogate. For, under the provisions of the statutes and the Code, it was contemplated that such fees should be adjusted by the surrogate before payment by the administrator or executor. When so adjusted the executor or administrator, whichever it may be, is deemed to represent the interests of the estate, of the next of kin and of the legatees.

Under the Laws of 1873, chapter 225, it is provided that, "upon the application of any executor or administrator, the surrogate who granted letters testamentary or of administration shall, by writing, appoint two disinterested appraisers as often as occasion may require, to estimate and appraise the personal property of a deceased person, and such appraisers shall be entitled to receive a reasonable compensation for their services, to be allowed by the surrogate, but not exceeding for each appraiser the sum of five dollars for each day actually employed in making an appraisement or inventory, in addition to his actual expenses necessarily incurred, the number of days' services so rendered and the amount of such expenses to be verified by the affidavit of the appraiser performing such services, to be made and delivered to the executor or administrator before payment of such fees, and to be adjusted by the surrogate." In 1893 section 2711 of the Code of Civil Procedure was amended so as to provide that the number of days of services rendered, and the amount of expenses incurred by the appraisers "must be verified by the affidavit of the appraisers, delivered to the executor or administrator, and adjusted by the surrogate *before payment of his fees.*"

With respect to the question under consideration the provisions appear to be substantially the same. Under the Code the fees must be adjusted by the surrogate before payment. In the statute the phrase "to be adjusted by the surrogate," appears after the words "before payment of such fees." But the phrase clearly relates back to that which precedes the

words quoted, and contemplates the adjustment of the fees by the surrogate, before the administrator or executor is required to pay. But in this case the appraisers never procured their fees to be taxed. They were paid by the executor at or about the time that they completed and delivered over the inventory. The executor waited until after the estate had been settled, an action to have its accounts adjusted brought, and the trial of that action commenced before it took any steps to have the fees of the appraisers adjusted. At that time it was acting in its own interest to secure the audit and allowance of its own claim, and without stopping to consider whether the trust company could, at that time, upon its own motion and on its own stipulation, properly procure an order taxing the fees of the appraisers, we are clearly of the opinion that the legatees had the right to be heard, either upon the original application or by an affirmative motion to vacate.

We are thus brought to a consideration of the motion upon the merits. It appears from the moving papers that the inventory contains a list of the furniture in the residence of the deceased, and that the same was appraised in a lump sum at \$2,940.40; that this list was made out by one De Waltearss, who put the value upon the articles and was paid the sum of \$86.22 for his services; that the counsel for the appellants filled out the inventory with the exception of the securities and cash which was prepared by the executor, the trust company, or its attorneys, so that the appraisers had nothing whatever to do except to see that the furniture was in the house and compare the list of securities with the securities themselves and ascertain their market value. Aside from the furniture and the items of cash on hand, the estate consisted of twenty-seven different kinds of securities, chiefly railroad and corporate stocks. The motion papers further show that the market value of the securities could have been ascertained by a visit to the New York Stock Exchange or to the office of any stock broker, in a single day's time, and that the charges for appraisers' fees were grossly exorbitant. No affidavits appear

to have been read in opposition to the motion, controverting these facts. The surrogate, however, appears to have considered the affidavits of the appraisers presented upon the original motion for taxation as before him and upon them to have held that it appeared that they each had been employed more than fifty days upon the appraisal, and that he could not state, from an inspection of the inventory, that their statements were improbable. We are unable to agree with him. Section 2565 of the Code of Civil Procedure provides that "an appraiser is entitled, in addition to his actual expenses, to a sum to be fixed by the surrogate not exceeding \$5 for each day actually and necessarily occupied by him in making the appraisal or inventory, the number of days' services and the expenses, if any, must be proved by the affidavit of the appraisers and the sums payable therefor taxed by the surrogate and paid by the executor or administrator."

It will be observed that the discretion of the surrogate is limited to \$5 for each day actually and necessarily occupied by the appraisers. Beyond that amount he has no discretion. He is required to ascertain the number of days actually and necessarily occupied by them. This fact is to be found by him and should be determined from the evidence presented. He has found that the appraisers were each actually and necessarily occupied fifty days. Is this finding correct? Ordinarily, questions of fact and questions as to the weight of evidence are final in the General Term and this court has no power to review the determination of that court with reference thereto. But we have recently held that "where the evidence which appears to be in conflict is nothing more than a mere scintilla, or where it is met by well-known and recognized scientific facts about which there is no conflict, this court will still exercise jurisdiction to review and reverse if justice requires." (*Hudson v. R., W. & O. R. R. Co.*, 145 N. Y. 408; see, also, *People ex rel. Coyle v. Martin*, 142 id. 352; *Hemmens v. Nelson*, 138 id. 517-529; *Linkhauf v. Lombard*, 137 id. 417.)

Should a person affirm that black was white or white was black, or being in the full possession of his faculties, and having the unrestricted use of his limbs, should testify that he actually and necessarily occupied a year in walking a mile, his statements would be so in conflict with recognized possibilities as to be entitled to no credit or character as evidence.

As we have seen, the inventory was prepared by others. The only thing left for the appraisers to do was to examine the furniture, compare it with the list made, examine the securities entered in the inventory and attach thereto the values which could have been ascertained in a day's time in any stockbroker's office in the city of New York. Upon these undisputed facts we cannot sustain the finding that the appraisers each *actually* and *necessarily* occupied fifty days in making their inventory.

It appears that this estate was valued at nearly \$300,000. It was considered large and a custom may have prevailed to some extent to make liberal allowances for services performed with reference to such estates; but appraisers are officers of the court, appointed by it and their fees are regulated by statute. It makes no difference whether the estate is large or small. They have no right to demand or receive more than the statute allows, unless the parties interested consent, and if a different custom has prevailed it should be discontinued.

Whether the surrogate should entertain jurisdiction to tax the appraisers' fees pending a trial of the action in the Supreme Court we do not now determine.

The order appealed from should be reversed and the motion granted, with costs in all courts.

All concur.

Ordered accordingly.

HIRAM HITCHCOCK, as Executor, etc., Respondent, v. FANNY
M. PEASLEE, Respondent, et al., Appellants.

As a general rule, when a motion is made to set aside or modify a judgment founded on matters *in pais* and *dehors* the record, the granting of the relief sought is discretionary.

P., by his will, gave to his daughter F. \$20,000 in trust, "the same to revert at her death without issue" to the testator's widow and son. In an action brought by the executors it was adjudged that the fund was payable to F. ; that she was, however, not at liberty to spend or waste the principal, but was bound to keep it securely invested for the benefit of the remaindermen. The money was paid over to F. pursuant to the judgment. The widow thereafter died, and her executor made a motion at the foot of the decree for an order requiring F. to give security for the fund. These facts appeared thereon: The whole fund having been hopelessly lost by unfortunate investments, F. insured her life for \$20,000 to provide for its ultimate restitution. Her mother protested against this, asked F. not to continue the policies, and promised to forgive her the loss, and not call upon her for the fund. F. paid the premiums for a time, and then notified her brother of her inability to continue this, and suggested that he continue the policies; this he refused; she thereupon allowed \$10,000 of the insurance to lapse. The court required F. to give security for the one-half of the fund payable to the brother, but refused the application as to the one-half going to the mother. F. complied with the order. On appeal by the executor, *held*, that there was no absolute legal right to the security sought, but the matter rested in the reasonable discretion of the Special Term; and that this discretion had been exercised in behalf of the moving parties as fully as was justified.

(Argued March 22, 1895; decided April 9, 1895.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made October 12, 1894, which affirmed an order of Special Term confirming the report of a referee and denying a motion to require Fanny M. Peaslee to give security for a portion of a trust fund created by the will of Edmund R. Peaslee, deceased.

The facts, so far as material, are stated in the opinion.

Robert Hunter McGrath, Jr., for appellants. The practice of the appellants was correct. The proper method of amend-

ing or enforcing a final judgment when subsequent directions from the court are necessary is by a motion in the action at the foot of the judgment. (*Wetmore v. Law*, 42 How. Pr. 130; *Kamp v. Kamp*, 59 N. Y. 212, 215; *Hall v. Clarke*, 7 Paige, 382; *Wright v. Nostrand*, 94 N. Y. 31; *Buck v. Remsen*, 34 id. 383; *Binnse v. Wood*, 37 id. 532; *Adams v. Ashe*, 46 Hun, 105, 110; *Clarke v. Rowling*, 3 N. Y. 216; *Blodgett v. Blodgett*, 42 How. Pr. 19.) The referee was not appointed by the Supreme Court to hear and determine this controversy, and while his report is in the technical form of findings of fact and conclusions of law, it is not equivalent in weight to the verdict of a jury. The testimony reported by him and the proceedings in the action present questions of law and fact for the revision of this court. (*Marshall v. Meech*, 51 N. Y. 140; *In re Knapp*, 85 id. 284.) The bequest of Edmund R. Peaslee: "I give to my daughter Fanny M. Peaslee * * * twenty thousand dollars in trust, the same to revert at her death, if without issue, equally to my wife and my son," creates a life interest in Fanny M. Peaslee and a vested estate in equal shares in Martha K. Peaslee and Edward H. Peaslee, subject to be divested by the death of the first taker leaving issue surviving her. (*Nellis v. Nellis*, 99 N. Y. 505; *Griffin v. Sheppard*, 124 id. 70; *Hennessey v. Patterson*, 85 id. 91; *Kenyon v. See*, 94 id. 563; *Knowlton v. Atkins*, 134 id. 315; *Fowler v. Ingersoll*, 127 id. 472.) If the language of the bequest "to revert at her death, if without issue, equally to my wife and my son," created an estate in the widow which has been defeated by her death in the lifetime of Fanny M. Peaslee, this defeated interest does not pass to Fanny M. Peaslee, but forms part of the residuary estate disposed of under the will. (*Riker v. Cornwall*, 113 N. Y. 115; *Lamb v. Lamb*, 131 id. 227; *Power v. Cassidy*, 79 id. 602.) Martha K. Peaslee did not in her lifetime relinquish or give her interest in the trust fund to Fanny M. Peaslee, and her executors are entitled to security for its proper administration. (Perry on Trusts, § 851; *Gray v. Barton*, 55 N. Y. 68; *Young v. Young*, 80 id. 438; *Jackson v. R.*

N. Y. Rep.]

Statement of case.

Co., 88 id. 520; *In re Crawford*, 113 id. 560; *McKenzie v. Harrison*, 120 id. 266; *In re Blauvelt*, 131 id. 249, 254; *In re Camp*, 126 id. 384, 385; *Smith v. Van Nostrand*, 64 id. 285; *Collins v. Collins*, 32 Hun, 156.)

C. N. Bovee, Jr., for respondent. The devise consists of a conditional fee vested in the daughter, subject to being divested, and further of two contingent remainders, one in the mother to one-half the estate, and one in the brother to the other half thereof. (Gray on Perpetuities, § 101; *Vanderzee v. Slingerland*, 103 N. Y. 47; *In re N. Y., L. & W. R. Co.*, 105 id. 89; *Fowler v. Ingersoll*, 127 id. 472; *Avery v. Everett*, 110 id. 317; *Graham v. L. Ins. Co.*, 46 Hun, 261; *Kelso v. Lorillard*, 85 N. Y. 177; *Drummond v. Drummond*, 11 C. E. Green, 234.) The appellants' contention, that the terms of the bequest, "at her death without issue," does not mean the death of Frances during the life of the testator, but means death subsequent to that of the testator, is untenable. (*Wolfe v. Van Nostrand*, 2 N. Y. 436.) The third conclusion of law made by the referee and affirmed by Special and General Terms is correct, to wit, that by the death of Martha K. Peaslee during the life of Frances such interest as she had in the fund became extinguished. (*Kelso v. Lorillard*, 95 N. Y. 177; *In re Denton*, 137 id. 428.) As a matter of fact and of law, the interest of Mrs. Peaslee came to an end by her own voluntary relinquishment during her life. (*In re N. Y., L. & W. R. Co.*, 105 N. Y. 89; *Fleming v. Gilbert*, 3 Johns. 530; *Lattimore v. Harsen*, 14 id. 330; *Dearborn v. Cross*, 7 Cow. 48; *Gardner v. Gardner*, 22 Wend. 526; *Kent v. Reynolds*, 8 Hun, 559; *Beach v. Endress*, 51 Barb. 579; *Vanderbeck v. Vanderbeck*, 30 N. J. Eq. 265; *Phelps v. Johnson*, 8 Johns. 54; *Tine v. Nelson*, 38 N. J. L. 358; *Jones v. Q. Bank*, 29 Conn. 25; *Hastings v. Dickinson*, 7 Mass. 153; *Thurston v. James*, 6 R. I. 104.) The order appealed from is not reviewable in this court. The application made to the Special Term was addressed to the discretion of the court. It was affirmed by the General Term, and is not appealable to this court. (Code Civ. Pro.

§ 1337; *Duryea v. Vosburgh*, 121 N. Y. 53-63; *Lawrence v. Farley*, 73 id. 187; *Concklin v. Taylor*, 68 id. 221; *Howell v. Mills*, 53 id. 322; *Livermore v. Butterfield*, 56 id. 72; *Cushman v. Brundett*, 50 id. 296.)

FINCH, J. This appeal should be dismissed. The father of the defendant Fanny M. Peaslee by his will gave to her "twenty thousand dollars in trust, the same to revert at her death without issue equally" to his wife and son. An action was brought by his executors, seeking to some extent a construction of the will, in which it was adjudged that the fund of twenty thousand dollars was payable to the daughter and should be put in her possession, but that she was not at liberty to spend or waste the principal and was bound to keep it securely invested for the benefit of those entitled to the contingent remainder. In pursuance of the decree the money was paid over to the daughter. The testator's wife thereafter died and the executor of the mother made a motion at the foot of the decree for an order requiring the daughter, who continued to hold the fund as life tenant, to give security for its preservation and as a safeguard against loss or waste. The matter was sent to a referee to take proof of the facts, and it then appeared that the whole fund had already been lost by unfortunate investments in stocks. Wall street had engulfed it bodily. After this severe loss, the daughter insured her own life to provide for the ultimate restitution of the fund and for a time managed to pay the premiums. The mother on ascertaining the facts protested against the hard remedy, begged the daughter not to continue the policy, and promised to forgive her the loss and never to call upon her for the fund. It became difficult for her to bear the annual drain of the premiums, and she then notified her brother of the situation and suggested that he should keep the policies in life until she should be able to do it herself. He refused, and she allowed ten thousand dollars of the insurance to lapse, but kept ten thousand dollars in force. By the will of her mother she has become entitled to about thirty thousand dollars absolutely and ten thousand dollars for her life. On this

state of facts the court required her to give security for the one-half of the fund payable to Edward, and she has submitted to the order without an appeal, but the court refused the application as to the ten thousand dollars which was to revert to the mother, and Edward as executor of her will and his associate in that office appeal from the refusal after an affirmance by the General Term.

I think it is obvious that the order of the Special Term rested in its reasonable discretion which was exercised in behalf of the moving parties quite as fully as was justifiable. There was no absolute legal right to have the security sought. The possession of the fund had been adjudged to belong to the daughter. Whether she should give bonds for its preservation or ultimate payment over was a question dependent upon the after-occurring circumstances, and which the court might answer either way after giving them reasonable consideration. If the daughter, after having lost the fund, was insolvent, an order requiring her to give security would be in effect that she find somebody willing to pay the debt for her to her own brother. If, on the other hand, her mother's legacy had made her worth three times the amount of the lost fund the court may have deemed the demand for security unreasonable, especially in view of the daughter's claim that the mother had released the fund to her and discharged the liability. Such a question as that might very well be excluded from a determination upon a mere motion. Where one moves at the foot of a decree it is usually with permission given or reserved in the decree itself, and contemplates orders intended to carry out and effectuate the decree. Here the effort is to alter and modify it. It gave the fund without conditions, and is sought to be changed by imposing conditions. Practically it is a motion to set aside the judgment, founded on matters *in pais* and *dehors* the record. The general rule in such cases is that the relief sought is discretionary. (*Williams v. Montgomery*, 60 N. Y. 648.)

The appeal should be dismissed, with costs.

All concur.

Appeal dismissed.

**AMERICAN SUGAR REFINING COMPANY, Appellant, v. CHARLES
H. FANCHER, Assignee, Respondent.**

Where a sale of personal property was induced by fraud on the part of the vendee, and the property has again been sold by the latter, and the proceeds of such sale, in the form of notes or credits, are identified specifically and beyond question in the hands of the latter, or in the possession of his voluntary assignee, a court of equity has power, in the absence of any adequate legal remedy, to reach such proceeds and apply them for the benefit of, and to so far indemnify, the defrauded vendor.

In respect to such a remedy an assignee, for the benefit of creditors of the fraudulent vendee, stands in no other or better position than his assignor. Where, therefore, in an equitable action brought by a vendor of goods sold on credit to reach the proceeds of sub-sales of the goods, it appeared that the sale was induced by fraudulent representations on the part of the vendees, who were at the time hopelessly insolvent; that the latter sold to various customers, in the ordinary course of business, portions of the goods on credit, and thereafter made an assignment to defendant for the benefit of creditors, when the vendor, for the first time, discovered the fraud; that the claims against the sub-vendees were among the assets that passed by the assignment, and that these claims were collected by the assignee after the assignment and after notice from the plaintiff of rescission of the original sale for the fraud, *held*, that the action was maintainable, and that a judgment against the assignee, directing an accounting and payment by him of the proceeds of such collections, was proper.

Am. Sug. Ref. Co. v. Fancher (81 Hun, 56), reversed.

(Argued March 22, 1895; decided April 9, 1895.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made at the October term, 1894, which reversed an interlocutory judgment in favor of plaintiff, entered upon the report of a referee and the final judgment entered thereon, and ordered a new trial.

This action was brought by plaintiff against defendant, as assignee, for the benefit of creditors of the firm of C. Burkhalter & Co., to recover the proceeds of the re-sale of certain goods alleged to have been fraudulently purchased from plaintiff by said firm.

The interlocutory judgment adjudged defendant a trustee of the goods mentioned in the complaint, and of the proceeds of such goods as had come into his hands as assignee, and that he account for, transfer and pay over to plaintiff all of said proceeds; a reference was ordered for the purpose of the accounting. A stipulation was afterwards entered into between the parties as to the amount of the proceeds received by defendant, and a final judgment in plaintiff's favor in accordance therewith was rendered.

The further facts, as far as material, are stated in the opinion.

Charles E. Hughes, Arthur C. Rounds and Frederic R. Kellogg for appellant. The plaintiff, as a defrauded vendor, is entitled to recover from the vendee or his voluntary transferee the proceeds of the re-sale of the property fraudulently purchased. (*Partridge v. Rubin*, 15 Daly, 344; *Jackson v. Cadwell*, 1 Cow. 622; 2 Am. & Eng. Ency. of Law, 444; *N. T. Co. v. Gleason*, 77 N. Y. 408; *Talbot v. Bank of Rochester*, 1 Hill, 293, 295; *Comstock v. Hier*, 73 N. Y. 269; Keener on Quasi Contracts, 159, 170, *et seq.*; *Rothschild v. Mack*, 115 N. Y. 1; *Catts v. Phelan*, 2 How. 376; *People v. Wood*, 121 N. Y. 522; *P. A. Co. v. N. S. & L. Bank*, 23 Abb. [N. C.] 172; *Abbotts v. Barry*, 2 Brod. & Bing. 369; *Browning v. Bancroft*, 8 Met. 278; *Roberts v. Ely*, 113 N. Y. 131; *Varet v. N. Y. Ins. Co.*, 7 Paige, 567; *Trevelyan v. White*, 1 Beav. 589; *Cheney v. Gleason*, 117 Mass. 557; *Hammond v. Pennock*, 61 N. Y. 145; *In re Hallett*, 13 L. R. [Ch. Div.] 696; *Holmes v. Gilman*, 138 N. Y. 369; *Baker v. Bank*, 100 id. 31; *Newton v. Porter*, 69 id. 133; 2 Pom. Eq. Juris. §§ 278, 1053; Story's Eq. Juris. § 1265; Bispham's Eq. § 91; Perry on Trusts, § 166; *Small v. Attwood*, Younge, 507; *I. & T. Bank v. Peters*, 123 N. Y. 272; *La Comité v. Bank*, 1 Cab. & El. 87.) The goods were obtained from the plaintiff by larceny, and upon this ground the plaintiff is entitled to recover their proceeds from the voluntary assignee of the persons guilty of the theft. (Penal Code, §§ 528, 544; 2 R. S. 677, § 53; 1 R. L. 1813, 410, § 13; 30 George II, chap. 24; *People v. Haynes*, 11 Wend. 557; *Robinson v. Dauchy*, 3 Barb. 20; 33 Henry VIII, chap. 1; 30 George II, chap. 24; *Mowrey v. Walsh*, 8 Cow. 238; *Andrew v. Dieterich*, 14 Wend. 31; *Peabody v. Fenton*, 3 Barb. Ch. 451; *Fassett v. Smith*, 23 N. Y. 252; *Ross v. People*, 5 Hill, 254; *Zink v. People*, 77 N. Y. 114; *Thorne v. Turk*, 94 id. 90; *People v. Lyon*, 99 id. 210; *People v. Dumar*, 106 id. 502; *Benedict v. Williams*, 48 Hun, 123; Code Crim. Pro. §§ 685-687; 21 Henry VIII, chap. 11; 24 & 25 Vic. chap. 96, § 100; *Bentley v. Vilmonit*, L. R. [12 App. Cas.] 471; *Queen v. Justices*, L. R. [17 Q. B. D.] 598; 18 id. 314; *Newton v. Porter*, 69 N. Y. 133; *Riggs v. Palmer*, 115 id. 506.)

James B. Dill for respondent. The plaintiff is entitled to no preference over all the other creditors of the insolvent estate on the ground that his contract was tainted with fraud. (*S. B. L. Co. v. Ott*, 142 U. S. 623; *Heinmann v. Kapp*, 9 N.

Y. S. R. 69, 71; *Tim v. Smith*, 13 Abb. [N. C.] 31.) The plaintiff cannot maintain this action because it failed to rescind the contract before the vendees sold the goods and before the assignment was made. (*Daw v. Sanborn*, 3 Allen, 181; *Kline v. Baker*, 99 Mass. 253; *Wise v. Grant*, 140 N. Y. 593; *Bosley v. N. M. Co.*, 123 id. 550.) The fraud of the Burkholders did not make the assignee a trustee *ex maleficio*. (Dwight on Personal Property, 423; *Newham v. May*, 13 Price, 749; *Hammond v. Pennock*, 61 N. Y. 145; *Buzard v. Houston*, 119 U. S. 347; *Suter v. Mathews*, 115 Mass. 253; *Carpenter v. Danforth*, 52 Barb. 581; *Holmes v. Gilman*, 138 N. Y. 369.) The Penal Code, in characterizing as a crime and providing a punishment for obtaining goods under false pretenses, by no means changed the well-established rules of law as applicable to contracts. (*Wise v. Grant*, 140 N. Y. 593; *Goodwin v. Wertheimer*, 99 id. 149; *Benedict v. Williams*, 47 Hun, 123; Dwight on Personal Property, 423.) Equity will not turn a completed sale of chattels into a trust *ex maleficio*. (*Bagne Franco-Egyptienne v. Brown*, 34 Fed. Rep. 162.)

ANDREWS, CH. J. This case presents a question of considerable practical importance. It relates to the equitable jurisdiction of the court under special circumstances to follow proceeds of personal property in the hands of a fraudulent vendee or his general assignee for the benefit of creditors at the suit of a defrauded vendor, who by false pretenses was induced to part with the property upon credit, the proceeds sought to be reached being the sums due from sub-vendees of the fraudulent purchaser arising on re-sales by him made before the discovery by the plaintiff of the fraud. The facts upon which the question arises are substantially conceded and are free from complication. Between the 20th day of September, 1892, and the 20th day of October following, the plaintiff sold and delivered to the mercantile firm of C. Burkhalter & Co., doing business in the city of New York, sugars of various qualities on credit for the price in the aggregate of

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\$19,121.41, no part of which has been paid, the last sale having been made October 19th, 1892. On the next day, the firm being insolvent and owing debts greatly in excess of its assets, made a general assignment to the defendant for the benefit of its creditors. Among the assigned assets were a portion of the sugars sold by the plaintiff to the firm, which he replevied from the assignee, but the firm, prior to the assignment, had sold to numerous persons, customers of the firm, in the ordinary course of trade, portions of the sugars on credit and claims held by the firm against the sub-vendees arising out of such sales, exceeding in the aggregate the sum of \$10,000, were among the assets which passed by the assignment. These claims were collected by the assignee after the assignment, and (excepting a small sum) after notice had been served by the plaintiff on the assignee that it rescinded the original sale for fraud, which notice was accompanied by a demand for the sugars then in the possession of the assignee, and for an accounting and the delivery to the plaintiff of the outstanding claims against the customers of Burkhalter & Co. in their hands for the sugars sold by the firm as above stated. The assignee declined to accede to the demand made. On the trial the parties by stipulation fixed the amount of the claims for sugars sold which had come to the hands of the assignee, and which had been collected by him.

The fraud of Burkhalter & Co. was not controverted. It was shown that the sales were induced by a gross misrepresentation in writing made by one of the members of the firm to the plaintiff as to the solvency of the firm, made on or about September 20th, 1892, within thirty days before the assignment, and when the firm was owing several hundred thousand dollars more than the value of its whole assets.

The case presented is singularly free from any uncertainty in respect to the facts upon which the equitable jurisdiction to follow the proceeds of the sugars is claimed. They are definite and ascertained, but it is insisted that the court is impotent to give relief by way of subjecting the choses in

action or their proceeds, representing the sugars, to a lien in favor of the defrauded vendor, or to adjudge that they shall be applied in partial recompense and restitution for the property so wrongfully obtained, because, as is claimed, such relief is not in any such case within the scope of the powers of courts of equity as heretofore defined and exercised, and for the further reason that new rights have intervened by reason of the assignment. The fraud of Burkhalter & Co. was, as we have said, admitted. They are hopelessly insolvent, and were so at the time they took the plaintiff's goods. They disposed of a large part of the sugars before the plaintiff became cognizant of the fraud. The plaintiff was only apprised of it after the assignment was made. The remedy at law upon the contract against the fraudulent and insolvent purchaser is, under the circumstances, ineffectual. The pursuit of the property, except the small part of it which was unsold and passed to the assignee, is impracticable. If it could yet be found unconsumed and capable of identification, the multiplicity of suits which would be rendered necessary to reclaim it would make the remedy expensive, burdensome and inadequate. The identification of the proceeds sought to be reached is complete and unquestioned. It is not claimed that the credits or the money into which they have been converted are not the very proceeds of sugars of which the plaintiff was defrauded.

The jurisdiction of a court of equity to follow the proceeds of property taken from the true owner by felony, or misapplied by an agent or trustee, and converted into property of another description, and to permit the true owner to take the property in its altered state as his own, or to hold it as security for the value of the property wrongfully taken or misapplied, or, in case the original property or its proceeds have been mingled with that of the wrongdoers in the purchase of other property, to have a charge declared in favor of the person injured to the extent necessary for his indemnity, so long as the rights of *bona fide* purchasers do not intervene, has been frequently exerted and is a jurisdiction founded upon the plainest principles of reason and justice. The case of

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Newton v. Porter (69 N. Y. 133) is an illustration of the application of this principle in a case of the larceny of negotiable bonds, sold by the thieves, in which the court subjected securities in which they invested the money, and which they had transferred with notice to third persons as security for services to be rendered, to a charge in favor of the owner of the stolen bonds. The cases upon this head are very numerous, where there has been a misapplication of trust funds by trustees, or persons standing in a fiduciary relation, and the money or property misapplied has been laid out in land or converted into other species of property. The court in such cases lays hold of the substituted property and follows the original fund, through all the changes it has undergone, until the power of identification is lost or the rights of *bona fide* purchasers stop the pursuit, and holds it in its grasp to indemnify the innocent victim of the fraud. And even in case of money, which is said to have no earmark, its identity will not be deemed lost, though it is mingled with other money of the wrongdoer, if it can be shown that it forms a part of the general mass. (*Pennell v. Deffell*, 4 DeG., M. & G. 372; *In re Hallett*, 13 Ch. Div. 696; *Holmes v. Gilman*, 138 N. Y. 369.) In the cases of stolen property, or of misapplication by a trustee or agent of the funds of the principal or *cestui que trust*, the title of the real owner of the property has been in most cases lost, without his consent, and the court, by a species of equitable substitution, repairs, as far as practicable, the wrong, and prevents the wrongdoer from profiting by his fraud. And, indeed, courts of law, borrowing the equitable principle, in cases of misappropriation by agents, vest in the principal at his election the legal title to a chattel or security in the hands of the agent, purchased exclusively by the application of the embezzled or misappropriated fund. (*Taylor v. Plumer*, 3 M. & S. 562.)

It is at this point that the controversy in the present case commences, and the divergence arises which has led to this litigation. It is claimed, on behalf of the defendant, that courts of equity in commercial cases, where the claim of the

plaintiff originates in a fraud in the sale of personal property, does not undertake to follow proceeds in the hands of the wrong doer, but that the defrauded party having consented to part with his title, is remitted exclusively to such legal remedies as are given for the redress of the wrong. The jurisdiction of courts of equity in cases of trust or agency, or cases of like character, it is insisted, is founded upon the ancient jurisdiction of these courts over trusts and fiduciary relations, and has not been and ought not to be extended beyond these cases. It is very true that trusts and trust relations are peculiarly cognizable in equity, and have been so cognizable from the earliest period of equitable jurisprudence. But it is to be said that these are but branches of the larger jurisdiction over frauds, which equity abhors, and of which it has cognizance admittedly in many cases not connected with technical trusts or agency. It cannot be denied that the protection of *cestui que trusts* against frauds of the trustee is an object of peculiar solicitude in courts of equity. They, in many cases, are incapable, by reason of age, inexperience or other incapacity, from looking out for themselves, and the court stands in the attitude of guardian of their interests. But, as has been said, a court of equity does not restrict its remedial processes to the aid of the helpless or the ignorant. It embraces within its view the general claims included within what are called *quasi* trusts, and intervenes to prevent violations of equitable duty by whomsoever committed or whoever may suffer from the violation. It goes altogether outside of trust relations in many cases to prevent fraud, or to compel a restoration of property obtained by fraud. The exercise of the jurisdiction to set aside fraudulent transfers of real or personal property made in fraud of creditors is familiar. And the jurisdiction is most beneficially invoked in cases of private fraud to rescind transfers of real estate procured by fraudulent representations, and to restore to the defrauded vendor the title of which he has been defrauded. It often happens in cases of transfers of real estate procured by fraud that, before the action is brought or

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the plaintiff is apprised of the fraud, the fraudulent vendee has disposed of the land in whole or in part, or has created liens thereon in favor of the *bona fide* purchasers for value. In such cases the court will mould the relief to suit the circumstances, and will, at the election of the plaintiff, rescind the contract and compel a re-conveyance of the part of the land still remaining in the hands of the vendor, and compel the wrongdoer to account for the proceeds of the land sold, or award compensation in damages. The court in many cases resorts to the fiction of a trust, and, by construction, adjudges that the proceeds in the hands of the wrongdoer are held by him as trustee of the plaintiff. This was the exact nature of the relief granted in the case of *Trevelyan v. White* (1 Beav. 589), as appears by the recital of the decree in the opinion of the master of the rolls, where part of the estate had been sold by the fraudulent vendee. In *Cheney v. Gleason* (117 Mass. 557) a bill was filed by the defrauded vendor of real estate to reach a mortgage taken by the vendee on the land on a re-sale by him, and the court sustained the bill and granted the relief. In *Hammond v. Pennock* (61 N. Y. 145) the court rescinded, at the instance of the plaintiff, a contract for the exchange of real and personal property, owned by the plaintiff, for a farm of the defendant in Michigan, which had been consummated on the plaintiff's part by a conveyance and transfer, the contract and conveyance having been obtained by the defendant by fraudulent representations; and the defendant having, after the conveyance to him, contracted to sell part of the land conveyed to him by the plaintiff, the court adapted the relief to the circumstances and rescinded the conveyance so far as practicable, and adjudged that the defendant account for the proceeds of the personal property included in the sale. If the jurisdiction exercised by courts of equity in respect to undoing fraudulent conveyances of real estate and following the proceeds in the hands of the fraudulent grantee, appertains in like manner and degree to sales of personalty, it would seem that the plaintiff in the present case was entitled to relief.

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The fact that before the action was brought, Burkhalter & Co. had made a general assignment for the benefit of creditors to the defendant is no obstacle to the relief, if, except for the assignment, the court would have interposed, on the prayer of the plaintiff, its preventive and other remedies, to have enabled the plaintiff to reach the unpaid claims against the sub-vendees. As assignee for creditors he is not a purchaser for value, and stands in no other or better position than his assignor as respects a remedy to reach the proceeds of the sales. (*Goodwin v. Wertheimer*, 99 N. Y. 149; *Barnard v. Campbell*, 58 id. 76; *Ratcliffe v. Sangston*, 18 Md. 383; *Bussing v. Rice*, 2 Cush. 48.) It is claimed that the general creditors of the firm will be prejudiced if the plaintiff is allowed to prevail, and that he will thereby acquire a preference over the other creditors of the insolvent firm. But general creditors have no equity or right to have appropriated to the payment of their debts the property of the plaintiff, or property to which it is equitably entitled as between it and Burkhalter & Co. They, so far as appears, advanced nothing and gave no credit on the faith of the firm's possession of the sugars, assuming that that element would have had any bearing on the case. If the sugars had existed in specie in the hands of the assignee it cannot be doubted that the plaintiff on rescinding the sale would have been entitled to retake them, and the general creditors are in no worse position, if the plaintiff is awarded the proceeds, than they would have been if the sugars had remained unsold.

Much was said on the argument upon the difference between a trespasser taking and disposing of the property of another and the case of a sale of personal property to a vendee induced by fraud. It is the law of this state, as in England, that title passes on such a sale to the fraudulent vendee, notwithstanding that the crime of false pretenses is included in the statute definition of a felony, but which was not such at common law. (*Barnard v. Campbell*, *supra*; *Wise v. Grant*, 140 N. Y. 593; Benj. on Sales [6th

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ed.], § 433; *Fassett v. Smith*, 23 N. Y. 252; *Benedict v. Williams*, 48 Hun, 124.) But a purchase procured by fraud is in no sense, as between the vendor and vendee, rightful. It was wrongful, and while a transfer so induced vests a right of property in the vendee until the sale is rescinded, the means and act by which it was procured was a violation of both a legal and moral duty. But the rule is that a sale of personal property induced by fraud is not void, but is only voidable on the part of the party defrauded. "This does not mean that the contract is void until ratified; it means that the contract is valid until rescinded." When a contract of sale infected by fraud of the vendee is consummated and the property delivered, the vendor on discovering the fraud may pursue one of several courses. He may affirm the contract, and an omission to disaffirm within a reasonable time after notice of the fraud will be deemed a ratification. He may elect to rescind it, and thereby his title to the property is reinstated as against the purchaser and all persons deriving title from him, not being *bona fide* purchasers for value, and a purchaser is not such who takes the property for an antecedent debt or who purchased the property on credit and has not paid the purchase money or been placed in a position where payment to a transferee of the claim cannot be resisted. (*Barnard v. Campbell*, *supra*; *Dows v. Kidder*, 84 N. Y. 121; *Matson v. Melchor*, 42 Mich. 477; 1 Benj. on Sales, p. 570, note.) Upon rescission the vendor may follow and re-take the property wherever he can find it, except in the case mentioned, or he may sue for conversion.

When these legal remedies are available and adequate, clearly there is no ground for going to a court of equity. The legal remedies in such case are and ought to be held exclusive. But in a case like the present, where there is no adequate legal remedy, either on the contract of sale or for the recovery of the property in specie, or by an action of tort, is the power of a court of equity so fettered that where it is shown that the property has been converted by the vendee and the proceeds, in the form of notes

or credits, are identified beyond question in his hands, or in possession of his voluntary assignee, it cannot impound such proceeds for the benefit of the defrauded vendor? The only reason urged in denial of this power, which to our minds has any force, is based on the assumption that it would be contrary to public policy to admit such an equitable principle into commercial transactions. But with the two limitations adverted to, and which ought strictly to be observed, (1) that it must appear that the plaintiff has no adequate remedy at law, either in consequence of insolvency, the dispersion of the property or other cause, and (2) that nothing will be adjudged as proceeds except what can be specifically identified as such, business interests will have adequate protection. Indeed, the disturbance would be much less than is now permitted in following the property from hand to hand until a *bona fide* purchaser is found.

The case of *Small v. Attwood* (Younge, 507) is a very instructive case, which involved a large amount, was argued by eminent counsel and received great consideration. It supports, we think, the equitable jurisdiction invoked in the present case. It was an action by the purchaser to rescind a contract for the sale of mines and mining property induced by fraudulent representations, and to recover the purchase money paid to the amount of about £200,000. The court found the fraud and rescinded the contract, and made a decree for an accounting. On a supplemental bill being filed, showing that the purchase money paid had been invested by the seller in public securities in his name, which he afterwards caused to be put in the name of his mother, and that the purchaser had no other means adequate to re-pay the purchase money, the chancellor, on an application for an injunction restraining the transfer of the securities, held that the money paid could be followed into the stock purchased, and granted the injunction. The case *In re Cavin v. Gleason* (105 N. Y. 256) was an attempt to fasten upon the estate of an insolvent a preferential lien for money put into his hands by the plaintiff for the purchase of a mortgage for her, and which he applied, without

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authority, to the payment of his debts before the assignment, with the exception of a small sum (\$30.00), which went into the hands of the assignee. The court held that the money, which the insolvent had used to pay debts prior to the assignment, was not a preferred debt, but sustained her right to be paid the small sum which the assignee received belonging to the trust. This case points the distinction. The character of the debt gave it no priority. The fund had been dissipated and could not be traced among the assigned assets. There was no equitable ground of preference except for the small sum mentioned.

Upon the whole case, we are of the opinion that the judgment on the report of the referee was correct, and the order granting a new trial should, therefore, be reversed and the judgment on the report of the referee affirmed, with costs.

All concur.

Judgment accordingly.

DINA SULZ, as Administratrix, etc., Respondent, v. MUTUAL
RESERVE FUND LIFE ASSOCIATION, Appellant.

Where administrators of the estate of a deceased person have been duly appointed in this and also in another state where the decedent died, and the foreign administrator has first duly commenced an action upon a policy of insurance upon the life of the decedent found in the latter state at such death, by the service of process on an agent of the company appointed for that purpose, as prescribed by the laws of that state, a second action upon the policy is not maintainable in the courts of this state by the administrator here.

In such a case the principle of comity between the states requires a refusal upon the part of the courts of this state to entertain jurisdiction.

The words "legal representatives" ordinarily mean executors or administrators, and that meaning will be given them in any instance unless there be facts existing showing that the words were not used in their ordinary sense.

It seems, the mere fact that a policy of life insurance issued by a company residing in this state was found on the person of one dying in another state, but who, at the time of his death, was a resident of this state, will not preclude the maintenance of an action in the courts of this state upon the policy by an administrator appointed here.

Defendant issued "a certificate of membership or policy of insurance" to S., payable to his "legal representatives" at the home office of the company in the city of New York. In the application for membership and for a policy, in answer to the requirement to state the name of the beneficiary, the answer was "My estate." At the time of the issuing of the policy S. was in California. He sent the policy to his wife, the plaintiff here, at their residence in Brooklyn. S. thereafter returned to Brooklyn and then went to the state of Washington, taking the policy with him and leaving his wife in Brooklyn. S. notified defendant that he intended to make that state his home; he died there, having the policy in his possession. Letters of administration were issued to his widow in this state. She signed a written renunciation of her right to take out letters in Washington, and thereupon an administrator was appointed in that state, who commenced an action upon the policy by service of process upon an agent of the company, designated by it, residing in that state and duly authorized under its laws to receive such service. Thereafter this action was commenced by plaintiff as administratrix. *Held*, that the courts of this state ought not to take jurisdiction of the action.

By defendant's by-laws its object is stated to be "to promote the well-being of all its members and to furnish substantial aid to their families or assigns" in the event of a member's death. S. left no children. *Held*, that plaintiff was not entitled to maintain the action in her own right irrespective of her character as administratrix; that to the words "legal representatives" must be given the ordinary meaning.

Bishop v. Grand Lodge (112 N. Y. 627), distinguished.

(Argued March 21, 1895; decided April 16, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 11, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Raphael J. Moses and *F. A. Burnham* for appellant. The widow had no title as widow under the policy in suit, and could not as widow retain a judgment granted her as administratrix. (*Drake v. Pell*, 3 Edw. Ch. 251; *Tillmann v. Davis*, 95 N. Y. 25; Code Civ. Pro. § 1814; *Sheldon v. Hoy*, 11 How. Pr. 11.) The Washington administrator hav-

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ing possession of the written instrument evidencing the obligation and having first commenced suit, has a superior title to the plaintiff in this action. (*Holyoke v. U. M. L. Ins. Co.*, 22 Hun, 75; 84 N. Y. 698; *Morrison v. M. L. Ins. Co.*, 57 Hun, 97; *Atty.-Gen. v. Bowens*, 4 M. & W. 171; *Merrill v. N. E. L. Ins. Co.*, 103 Mass. 245.) The defendant only received as a member Charles H. Sulz, of San Francisco, state of California. No recovery can be had for any other Sulz. (Code Civ. Pro. §§ 2476, 2478; *In re Miller*, 5 Dem. 382.) The omission to state the name of W. J. Brunner as attending physician within the past five years, coupled with the serious character of the illness for which he was treated, made "No," an untrue answer to question 17—"Have any facts regarding your past health or present condition been omitted?"—and consequently avoided the policy, as the agreement was made part of the policy and warranted the answers to be full, complete and true. (*Jeffries v. L. Ins. Co.*, 22 Wall. 47; *Æ. L. Ins. Co. v. France*, 91 U. S. 510; *Dwight v. G. L. Ins. Co.*, 103 N. Y. 341; *Ripley v. Æ. F. Ins. Co.*, 30 id. 136, 162; *Foot v. Æ. L. Ins. Co.*, 61 id. 571; *Baker v. H. L. Ins. Co.*, 64 id. 648; *Burteau v. P. L. Ins. Co.*, 67 id. 595; *Graham v. F. Ins. Co.*, 87 id. 69, 74.)

Charles J. Patterson for respondent. The widow is sole beneficiary. She can take the benefit money as administratrix in trust for herself. The defendant owed no debt to the deceased member upon his death, nor to his estate; only to the beneficiary. (*Griswold v. Sawyer*, 125 N. Y. 411; *Laws of 1883*, chap. 175, § 19; *Greeno v. Greeno*, 23 Hun, 478; *Senior v. Aikeman*, 2 Redf. 302.) In a mutual benefit society the presence or absence of a certificate of membership is immaterial, the by-laws fixing the rights of membership. (*Sanger v. Rothschild*, 50 Hun, 157; *Griswold v. Sawyer*, 125 N. Y. 411; *In re E. R. F. L. Assn.*, 131 id. 354; *Wilkins v. Ellett*, 9 Wall. 740; *Atty.-Gen. v. Bowens*, 4 M. & W. 171, 191; *Slocum v. Sanford*, 2 Conn. 533; *Owen v. Miller*, 10 Ohio, 136; *Pinney v. McGregor*, 102 Mass. 190; *Wyman v.*

Halstead, 109 U. S. 654; *Williams v. Williams*, 130 N. Y. 198.) The deceased member could reside in another state and be domiciled in this state. (*U. S. Co. v. Hersse*, 79 N. Y. 461; *Bolton v. Schriever*, 135 id. 65.) Where there is no answer there is no breach. Nor is there any breach of warranty as to health. (*Dillebar v. H. L. Ins. Co.*, 69 N. Y. 262; *Cushman v. Ins. Co.*, 70 id. 76; *Boos v. N. M. L. Ins. Co.*, 64 id. 241; *Armour v. F. F. Ins. Co.*, 90 id. 456; *Dwight v. G. L. Ins. Co.*, 103 id. 346.) The appointment of an agent by defendant to receive legal process in a foreign state does not change the domicile of the corporation so as to make a debt owing by the company to a resident of New York an indebtedness in such foreign state, the plaintiff not having appeared nor being served in the foreign state. (*Douglass v. P. Ins. Co.*, 138 N. Y. 209.)

PECKHAM, J. This is an appeal by the defendant from a judgment in favor of the plaintiff for the amount of a certain policy of insurance for \$3,000 issued by the defendant, an insurance company organized under chapter 175 of the Laws of 1883. The policy of insurance or certificate of membership, as it is sometimes called, was issued by the defendant association January 20, 1891, to Charles H. Sulz, payable to his "legal representatives," at the home office of the company, in the city of New York, within ninety days, after satisfactory evidence of the death of the insured party. The application for membership and for a policy of insurance in the corporation defendant was made by the insured, Charles H. Sulz, in December, 1890. In such application, in answer to the requirement to state the name of the beneficiary in full, he answered "my estate." Mr. Sulz, at the time of the issuing of the policy to him (Jan. 20, 1891), was at San Francisco in California, and, upon its receipt, he sent it to his wife at their residence in the city of Brooklyn, to which city he soon returned, and it remained in the possession of the wife for about six months, when, on the removal of the family (the husband and wife) from one house to another in the city of Brooklyn, the wife

packed it in a trunk, which was taken by the deceased when he started on his journey to Tacoma in the state of Washington. When the deceased went to Tacoma in 1891 he left his wife at his old home in the city of Brooklyn. In August, 1891, he wrote from the city of Tacoma to the home office of the defendant in the city of New York notifying them that he had made Tacoma, Washington, his home for the future, having gone into the manufacture of soaps and chemicals there, and he asked them to forward assessments to him at Tacoma, or to notify him who their agent was there, to whom he might make further payments. In January, 1892, Mr. Sulz died at Tacoma, having at the time this policy or certificate in his possession. At the time of his death his wife was still residing in Brooklyn. Letters of administration were applied for by his widow to the surrogate of Kings county and were granted, and she duly qualified and entered upon the discharge of her duties as administratrix. A few days after the granting of such letters she signed a written renunciation of her right to take out letters as administratrix in Tacoma and forwarded it to the former attorneys of her husband at that place, and thereupon one R. P. Thomas was appointed administrator of the estate of her husband by the proper court in the state of Washington. Mr. Thomas at once commenced an action in that state to recover upon the policy of insurance which he had taken possession of as part of the effects of the deceased, and such suit was commenced by the service of process upon an agent of the defendant residing in the state of Washington and duly authorized under the laws of that state, and by the designation of the defendant corporation to receive such service on its behalf. Within a few days subsequent to the commencement of that action the plaintiff herein commenced this action as administratrix of the estate of her deceased husband in the Supreme Court of this state to recover the amount due under such policy of insurance. The defendant set up a defense to this action based upon an alleged breach of warranty by the insured in making false answers to certain questions contained in the application for insurance

signed by him. It also set up the above facts in relation to the insurance policy and the pendency of the action against it in the Superior Court of the state of Washington, and claimed that the plaintiff herein had no right to maintain this action because of these facts. The case was tried at Circuit, and the facts relating to the alleged breach of warranty submitted to a jury, and upon the whole case the jury found a verdict for the plaintiff, and the question is whether the judgment entered upon that verdict shall stand.

We will assume that the letters of administration granted to the plaintiff by the surrogate of Kings county are conclusive in regard to the *status* of the plaintiff as being the administratrix duly appointed upon the estate of her deceased husband, and the only question remaining is whether as such administratrix and upon the facts in this case she can maintain this action. We are of the opinion that the courts of this state ought not to take jurisdiction of this action. The defendant issued what it terms in the blank application provided by it a "certificate of membership or policy of insurance," by which certificate or policy it insured the life of Mr. Sulz for \$3,000 for the benefit of his "legal representatives," those words being used in the instrument instead of the words "my estate," as used by the insured himself in his application for the insurance. The constitution and by-laws of the company and the certificate or insurance policy itself must all be looked at for the purpose of discovering what was the contract entered into by the parties. (*In re Equitable Reserve, etc., Assn.*, 131 N. Y. 354-368.) In some companies, possibly in this, a person might become a member thereof, and his family or any other named beneficiary be entitled to receive the benefit of such membership upon his death, as provided for in the constitution or by-laws, even where no certificates of membership or policy of insurance had been issued; but where such a paper has been issued by the company and delivered to and accepted by the insured person, it must be read in connection with such constitution and by-laws for the purpose of determining what the contract was which existed between the

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parties at the time of the death of the insured. The policy in this case was in the possession of the deceased at the time of his death in the state of Washington, and I do not think that it differs materially from any other policy of insurance so far as this question is concerned. Having been issued it has become a material part of the contract between the parties to it.

The case of *Holyoke v. Union Mutual Life Ins. Co.* (22 Hun, 75) is cited by defendant and is somewhat in point. In that case the plaintiff, as executrix of George E. Holyoke, brought an action in this state against the insurance company (a New York corporation) for the purpose of recovering the amount of a paid-up policy issued upon the life of one Alfred S. Perkins, a resident of the state of Maine, and by him assigned to Holyoke. The plaintiff's testator died in Brooklyn, N. Y., May 7, 1875, where he had continuously resided for sixteen years prior to his death and he left a will by which he bequeathed and devised his whole property to his wife, the plaintiff, which will was duly admitted to probate in Kings county, and on June 8, 1875, letters of administration were issued to the plaintiff. After the death of Mr. Holyoke the assignment was found among his effects at his office in the city of New York and was delivered to the plaintiff, and had been in her possession up to the commencement of the action. On October 8, 1878, Alfred S. Perkins, the insured person, died and the plaintiff immediately gave proper proofs of his death and otherwise duly performed all the conditions required of her by the policy and demanded its payment. The defense interposed was that the assignment in question was a collateral assignment only to secure Perkins' indebtedness to Holyoke and that the amount due the latter had been paid and that letters of administration with the will annexed upon the estate of Holyoke had been issued to one Percival Bonney by the Probate Court of Cumberland county, Maine, and that the policy of insurance was in the state of Maine at the time of Holyoke's death, and had been by Bonney assigned to and was then held and owned by

another person residing in the state of Maine. The court held that at the time of the death of George Holyoke the legal title to the policy in controversy was vested in him; that he held a written assignment of the policy, and that in contemplation of law it was in his possession. The policy was, however, as matter of fact in the state of Maine when the testator died and was taken possession of by the administrator of his goods, etc., with the will annexed, who had been appointed by the Probate Court in the latter state. The court said it was immaterial whether the assignment to Holyoke by Perkins was as collateral security for the debt due from the latter to Holyoke or whether it was an absolute one. If collateral, the debt was due from Perkins himself, and he being a resident of Maine, no one could enforce payment of the debt in the courts of Maine, or release or control the same save an administrator appointed in that state, and that if the assignment were absolute the policy of insurance is the thing which formed a part of the property of the testator; that the assignment was only a muniment of title to that property and must follow the thing assigned. It was stated that if the testator had left a chattel in Maine which remained in that state until after his death, it was clear that the chattel would belong to the administrator in Maine as against the administrator in New York, although the bill of sale transferring the chattel to the testator was found among his papers in New York, because administration of the property of the deceased person can be had only in the jurisdiction where the property is found after the death of such person and the fact that the property in controversy is a chose in action makes no difference in the rule of law on this subject. Upon appeal to this court the decision of the General Term was affirmed upon the opinion delivered by the court below (84 N. Y. 648). There are some expressions in the opinion delivered in the Supreme Court in this *Holyoke* case which we might doubt the correctness of. While the decision itself upon the facts appearing in the report was proper, we do not think that the mere fact that a policy of insurance is

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found on the person of an individual dying in another state, but who was a resident of this state at the time of his death, would preclude the maintenance of an action by an administrator appointed here upon the policy in the courts of this state against a company residing here, although the policy remained in the other state. A simple contract debt (and such is a policy of insurance) is assets where the debtor resides, even though evidenced by a written instrument. (*Wyman v. Halstead*, 109 U. S. 654; *Insurance Co. v. Woodworth*, 111 id. 138; *Chapman v. Fish*, 6 Hill, 554.)

The case of *Morrison, Public Administrator, v. Mutual Life Ins. Co.* (57 Hun, 97) is something like the *Holyoke* case, and it was held by the General Term, first department, that the administrator in New York could not enforce the payment of a policy of insurance issued by a company incorporated in this state to a resident of the state of Maine, where the policy had never thereafter been within the state of New York, even though the principal office of the company was in the city of New York. It was stated that the policy in question not having been in the state could not under the principle of the *Holyoke* case form any part of the assets of the deceased to which the plaintiff, an administrator appointed in the city of New York, acquired title. That case does not seem to have been brought to this court.

The facts in the case of *New England Life Insurance Company v. Woodworth* (cited *supra*) are as follows: The husband of the insured commenced an action against the insurance company in the state of Illinois, although the party insured (his wife) died in the state of New York, and the insurance company was organized under the laws of the state of Massachusetts, and it was only after the death of the wife that the husband came into Illinois having the insurance policy in his possession. The United States Supreme Court held that a company may be regarded as present in and an inhabitant of the state where it has an agent upon whom, pursuant to the laws of that state, process may be served, and that an administrator

is duly appointed in such state when the policy is brought within the state prior to such appointment, although the person insured died outside the limits of the state and not a citizen thereof. As the company is to be regarded as an inhabitant of the state where its agent is thus served with process, the court held that the principle that a simple contract debt followed the person of the debtor was not invaded, because the debtor was present in the state of Illinois when the suit was commenced by the husband as his wife's administrator, being at the same time the beneficiary under the policy. Under such facts the policy was assets in the state where it was when the administrator was appointed.

In this case the fact is the same; that is, the state of Washington had enacted a law providing for the designation of an agent by a foreign company, upon whom process could be served for it, and the company had duly appointed such an agent, and process was properly served upon him in the action by the Washington administrator upon the insurance policy in question.

Within the above case in the federal court the person of the debtor in this case was within the state of Washington, and the debt could be collected there as well as here. It is a case, therefore, of a concurrent jurisdiction, so far as the general facts go, and in such case the situs of the policy, the death of the insured in Washington and the issuing of letters of administration in that state and the prior commencement of the Washington action are material facts. In this case we do not assert that the courts of this state might not have had jurisdiction to entertain this action, even though the policy were in the state of Washington, provided the courts of that state had not appointed an administrator, and the administrator thus appointed had not commenced an action on the policy prior to the action in this state. On the contrary, we are inclined to the opinion that jurisdiction of this action would in such event be entertained by the courts here. But in the case of administrators duly appointed in each state, when the foreign administrator first duly commences an action by

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the service of process upon an agent of the company to recover on the policy, and the policy is found in the foreign state at the death of the assured in that state, we think the courts of the foreign state have obtained jurisdiction, and, therefore, could give a full and complete discharge to the company if it paid upon a judgment obtained in such action, and we ought not to permit a second action in the courts of this state upon the same policy. In such a case as this we think that the principle of comity between the states calls for the refusal on the part of the courts of this state to entertain jurisdiction.

It is claimed, however, that the plaintiff might recover in this action under another aspect and in her own right, irrespective of her character of administratrix. It is said that the policy is by its terms payable to the legal representatives of the insured. Attention is then called to the by-laws of the defendant, which state its object to be "to promote the well-being of all its members and to furnish substantial aid to their families or assigns in the event of a member's death." This, it is said, means the *immediate* families, or, in other words, the *dependents* of the members, and not remote relatives and immediate relatives and dependents indiscriminately, and that this provision, coupled with the proof of the dependence of the plaintiff upon her husband and that they had no children, makes the true construction of the policy to be that the amount due upon it belongs not to the general estate of the deceased, but to his widow. (*Griswold v. Sawyer*, 125 N. Y. 411; *Bishop v. Grand Lodge*, 112 id. 627, 636.) We do not think that this argument should prevail. Giving due consideration to the by-laws above quoted, the words "legal representatives" must still have their ordinary meaning. The by-law provides not only for the well-being of its members and for the furnishing of substantial aid to their families, but it adds the words "or assigns," showing that the company is not restricted in its objects to the immediate families of its members, but the members are themselves at liberty to designate another than a member of their

family as the beneficiary. As the members are not in any way restricted in the naming of a beneficiary by any by-law of the company or by its constitution, if there is any beneficiary named in the certificate or policy itself, that person is the one to whom the money shall be distributed. In the case at bar the insured named his estate in his application for insurance as the beneficiary thereof, and in the policy itself the words used are "legal representatives." We see nothing in the mere fact that the insured was married and had no children to vary the ordinary significance of the words "legal representatives" when used in a policy of insurance. As was said in *Griswold v. Sawyer* (*supra*) the words "legal representatives" mean ordinarily executors or administrators, and that meaning will be attributed to them in any instance unless there be facts existing which show that the words were not used in their ordinary sense, but to denote some other and different idea. The facts in this case are not sufficient to change the ordinary meaning of this language, and we, therefore, must attribute to the insured an intention in conformity to the ordinary meaning given to those words. We think that such meaning is strengthened if resort be had to the written application herein, because there the insured designates the beneficiary as his estate. That expression, it seems to us, refers to all the property which a man leaves behind him at the time of his death. (*Taylor v. Dodd*, 58 N. Y. 335, at 344.) A testator frequently uses in a will the expression, "all my estate I give, devise and bequeath," or "all my estate, real and personal," or "all my estate of every name and nature," meaning by the expression all the property which belonged to him and which could be devised or bequeathed. So here, by the use of those words, the testator meant to include the money arising from this insurance policy or certificate in the general amount of his property or that which would be left behind him to be distributed to his next of kin as in case of intestacy. In such case the administrator represents this estate which is to be added to by the payment of this money and such administrator takes the estate together with the addition thus made to it as a trustee, to be distrib-

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uted to those who by law are entitled to it. We do not think that under the circumstances arising in this case the creditors of the insured would take any interest in or right to any portion of the money arising from this policy. The statute under which the defendant is organized provides that the money arising from such insurance shall be exempt from execution and shall not be liable to be seized, taken or appropriated by any legal or equitable process to pay any debt or liability of the member. Reading the statute in connection with the language used by the deceased and it would seem to be plain that he intended this money should go to his legal representatives to be appropriated by them free from his own debts, and for the benefit of those who would take his estate under the Statute of Distributions. The administrator of this estate, therefore, represents the claims of those who may be eventually entitled to the money arising from the payment of this policy, and neither the widow nor the next of kin could maintain an action in their own right for the recovery of any portion of this money.

In *Bishop v. Grand Lodge* (112 N. Y. 627 at 636) we simply held that in the absence of any certificate designating the beneficiary where no policy or certificate had been issued, that there was enough in the constitution and by-laws of that company defendant to enable the court to say that the parties entitled to the moneys arising from the insurance were those to whom the estate of the deceased would pass as in case of intestacy and that the administratrix had sufficient interest in the fund to sustain the action in her capacity as such and that the money while subject to distribution as in case of intestacy, yet still would be a special fund subject to the exemption provided for in the act of incorporation and would not be liable for the payment of the debts of the decedent or to be taken on any process in the payment of such debts. We did not hold in that case that where an administratrix had been appointed, those who were the next of kin could themselves maintain an action for the recovery of the money due under the policy or certificate of membership, nor did we hold that

the administratrix could herself maintain the action in any other character. We cannot, therefore, see any way by which the plaintiff ought to be permitted to maintain her action either as administratrix or as the widow and alleged sole beneficiary covered by the policy. We confess that we do not see how the money arising from the payment under this policy or certificate can be made liable for any of the debts of the deceased any more in the state of Washington than in case the action was brought here. The statute under which the company is organized makes provision upon that subject; but as the courts of Washington have jurisdiction of that question it will be matter for them to decide, which they will do in a manner consistent with their views of the law.

The judgment in this action ought not to stand, and it must, therefore, be reversed, and, as the plaintiff cannot in any event succeed upon a new trial, her complaint should be dismissed, with costs out of the estate.

All concur, except O'BRIEN, J., not sitting.

Judgment accordingly.

FREDERICK H. CYRENIUS, as Administrator, etc., Appellant,
v. THE MUTUAL LIFE INSURANCE COMPANY of New York,
Respondent.

Defendant issued a policy of insurance upon the life of C. The policy stated the consideration therefor to be the payment of a sum specified, by G., a son of C., and that the amount insured was, on the death of C., to be paid to the "assured." In the written application for the policy, which was signed by both C. and G., the latter is described as the applicant and the person for whose benefit the insurance was intended. In an action upon the policy, brought by plaintiff as administrator of C., *held*, that plaintiff, as such administrator, had no interest in the cause of action, and so could not maintain the action.

Reported below, 78 Hun, 365.

(Argued February 27, 1895; decided April 16, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered

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upon an order made November 21, 1893, which reversed a judgment in favor of plaintiff entered upon a verdict and ordered a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

William Tiffany for appellant. The General Term reversed the judgment on the single ground that neither Alvin Cyrenius nor his estate was the owner of the policy, or had any cause of action under it, but that it belonged to George A. Cyrenius; this is erroneous. (Code Civ. Pro. §§ 113, 449; *Considerant v. Brisbane*, 22 N. Y. 386; *Pitney v. G. F. Ins. Co.*, 65 id. 6; *Kerr v. T. U. M. L. Ins. Co.*, 69 Hun, 393; *Grumal v. Schmidt*, 2 Sandf. 706; *Rowland v. Phalen*, 1 Bosw. 43; *Reed v. Harris*, 7 Robt. 151; *Allen v. Brown*, 44 N. Y. 228; *Green v. N. F. Ins. Co.*, 6 Hun, 128; *Burroughs v. S. M. L. Ass. Co.*, 97 Mass. 359; *Gould v. Emerson*, 99 id. 154; *Campbell v. N. E. M. L. Ins. Co.*, 98 id. 381; *Banks v. Wilks*, 3 Sandf. Ch. 99; *Wetmore v. Hageman*, 88 N. Y. 82; *Boon v. C. S. Bank*, 84 id. 83; *Bunn v. Vaughan*, 1 Abb. Ct. App. Dec. 253; *Emerson v. Blakely*, 2 id. 22; *Martin v. Funk*, 75 N. Y. 142.) In every case where a contract is made by or in the name of one person for the benefit of another, and where there is not an active trust created, an action on the contract may be brought in the name of either, and in that case, even if an action might have been brought in the name of George A. Cyrenius, this action can nevertheless be sustained, and the recovery in it will be a bar to any action in favor of George A. personally. In all such cases the person for whose benefit the contract is made may recover the fund from the party by whom or in whose name it is made for his benefit, less such sums as he may be entitled to deduct for expenses in the matter. (*Ludwig v. Gillespie*, 105 N. Y. 653; *Pitney v. G. F. Ins. Co.*, 65 id. 6; *Campbell v. N. E. M. L. Ins. Co.*, 98 Mass. 400.)

Edward Lyman Short and William H. Shepard for respondent. George A. Cyrenius was the beneficiary in the policy and the real party in interest, and the administrator of Alvin has no interest therein. (*Smith v. Æ. L. Ins. Co.*, 5 Lans. 545; *Hogle v. G. L. Ins. Co.*, 4 Abb. [N. S.] 346; May on Ins. § 112; Bliss on Life Ins. 6, 521; *Giddings v. Ins. Co.*, 102 U. S. 108; *Whiting v. M. Mut. Ins. Co.*, 129 Mass. 240; *Eckler v. Terry*, 95 Mich. 126; *Luchs v. C. M. L. Ins. Co.*, 108 U. S. 498; *Walsh v. M. L. Ins. Co.*, 133 N. Y. 418.)

O'BRIEN, J. This was an action upon a life insurance policy of \$3,000, dated June 18, 1873, whereby the defendant insured the life of one Alvin Cyrenius, who died on the 6th of June, 1877. This action was commenced by his widow, as administratrix, who died during its pendency, and the present plaintiff, her successor in office, was substituted in her place and continued the action.

The action was commenced in 1877, and has since been before the courts in various forms and with varying results. On the first trial the plaintiff recovered, but the judgment was reversed by the General Term. On the second trial there was a disagreement of the jury, and on the third trial the plaintiff again had a verdict, but the judgment was again reversed at General Term. From this judgment of reversal the plaintiff has appealed to this court.

We have given attentive consideration to the oral and written arguments of the learned counsel for the plaintiff and, without attempting to express an opinion upon all the numerous and interesting questions discussed, we think it quite sufficient to say that the single point upon which the decision of the court below was placed cannot be successfully answered. That was that the plaintiff, as the administrator of Alvin Cyrenius, has no interest in the contract or the cause of action. The other defense, that the policy lapsed before the death for non-payment of the premium, is also serious, but as that possibly involved the consideration of questions of fact, it need not

be further referred to. The other question is fully discussed in the opinion below, and, as we concur in its reasoning and result, it is scarcely necessary to follow the line of argument by means of which the learned counsel for the plaintiff has reached another conclusion. The action was one at law for the recovery of money due or payable to the plaintiff in his capacity as personal representative, and unless the policy was payable to his intestate, or came to the hands of the administrator as assets of the estate, he cannot recover. The defendant insists that the policy was payable to George A. Cyrenius, the son of the deceased, who before the death of the father, assigned it to the plaintiff individually, and, therefore, that the father, at his death, had no interest in it, and none passed to his personal representatives. That the son did assign the policy and, prior to the assignment, dealt with it as his property is undisputed. In behalf of the plaintiff, it is urged that the application, which is signed by both the father and the son, shows that Alvin intended to and did insure his life for the benefit of his estate. This view, it is claimed, is reinforced by other facts in proof, such as the payment of some part of the premium by the father. We think that nothing appears to change the effect of the plain words of the contract itself, the material part of which reads as follows:

"The Mutual Life Insurance Company of New York, in consideration of the representations made to them in the application for this policy, and of the sum of one hundred and ninety-eight dollars and eighty-seven cents, to them duly paid, by George A. Cyrenius, son of Alvin Cyrenius, and of the annual payment of a like amount on or before the 18th day of June in every year during the continuance of this policy, do insure the life of the said Alvin Cyrenius, of Scriba, in the county of Oswego, state of New York, in the amount of three thousand dollars for the term of his natural life; and the said company do hereby promise and agree to pay the amount of the said insurance at their office, in the city of New York, to the said assured, his executors, administrators or assigns, in sixty days after due notice and proof of the death

of the said person whose life is hereby insured, the balance of the year's premium, if any, being first deducted therefrom."

In the written application referred to and made a part of the contract, George is described as the applicant for the policy and the person for whose benefit the insurance was intended. Reading all the papers together, no other construction is possible except that adopted by the court below, that the contract is one insuring the father's life for the benefit of the son. The father's life, in which it is stated the son had an interest, was the subject of the insurance, and naturally and properly enough he was required to answer the questions and sign the application. But the son is the beneficiary. He is the assured to whom the defendant's promise to pay was made and to whom the insurance was payable in the event of death, and this promise or obligation was outstanding in the hands of his assignee when the action was commenced and is still so held. No construction of the language used in the policy and the application can fairly be adopted to make the contract or promise one for the benefit of the father's estate. There was no legal or equitable assignment to the father or to his personal representatives, and the extraneous facts and circumstances shown are all consistent with the purpose and intention of all the parties as expressed by the language of the policy. (*Ferdon v. Canfield*, 104 N. Y. 143; *Conn. Mut. Life Ins. Co. v. Luchs*, 108 U. S. 498; *Walsh v. Mut. Life Ins. Co.*, 133 N. Y. 418.)

The learned counsel for the plaintiff contends that the contract may be regarded as one made with and payable to the father for the benefit of his son, the father being a trustee of an express trust for the benefit of the son which upon his death devolved upon his administrator. There are many difficulties in the way of this theory, both of form and substance, even if such a construction could be given to the contract. We think that such a view of the legal relations of the parties is not possible. It would be doing violence to the language of the contract to say that it was made by the defendant with the father and in his name for the benefit of

the son. It is very plain, we think, that it was made with the son and in his name for his own benefit. The fact that the father signed the application with the son is not a circumstance of much significance as against the language of the policy itself. The defendant before entering into the contract needed to be informed in regard to the age, health and general history of the person whose life was the subject of the risk. No one could furnish that, but himself. This was the main purpose of the father's signature to the application. But even in that paper when the question was asked by the defendant with respect to the person for whose benefit the insurance was applied for, the answer is made that the son is such person. Then the amount of the insurance in the event of death is by the terms of the contract made payable to the *assured* and this term clearly refers to the son and not the father either as trustee or otherwise. The contract having been made with George in his own name for his own benefit he alone or his assignee is entitled to sue upon or enforce the defendant's promise.

The judgment should be affirmed and judgment absolute ordered for the defendant.

All concur.

Judgment affirmed.

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SARAH LAZARUS et al., Respondents, v. THE METROPOLITAN
ELEVATED RAILWAY COMPANY et al., Appellants.

A law changing procedure applies thereafter as well to actions pending when the statute was passed as to those subsequently commenced, unless the former are specially excepted.

The duty to note in the margin of a proposed statement of facts presented by the attorney of a party to an action tried before him, the manner in which each proposition was disposed of by him, formerly imposed upon a referee by the Code of Civil Procedure (§ 1023), he was not bound to perform until his decision of the action.

Where, therefore, after the submission of a case to the referee therein, and after the presentation of proposed findings, but before the decision by the referee, the provision of the Code was repealed (§ 1, chap. 688,

Laws of 1894), *held*, that the referee was relieved by the Repealing Act from the performance of said duty; that the right of a party to the action to have the referee pass upon his proposed finding was not saved from the operation of said Repealing Act by the provision of the Statutory Consolidation Act of 1892 (§ 81, chap. 677, Laws of 1892), which declares that the repeal of a statute "shall not affect or impair any act done or right accruing, accrued or acquired * * * prior to the time of such repeal," as no right had accrued at the time of the repeal.

(Argued April 8, 1895; decided April 16, 1895.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made January 18, 1895, which affirmed an order of Special Term denying a motion by defendants for the order sending back the decision of the referee herein with instructions to rule upon certain proposed findings of fact and conclusions of law as requested by defendants, or to vacate said report.

This action was brought to enjoin the defendant from operating its elevated railroad in Trinity place, in the city of New York, in front of plaintiff's premises.

The facts, so far as material, are stated in the opinion.

Brainard Tolles for appellants. Chapter 688 of the Laws of 1894 did not operate to relieve the referee from a judicial duty, the right to the performance of which had already accrued, in respect to the decision of a case on trial before the statute was passed. (*Dash v. Van Kleek*, 7 Johns. 499; *Benton v. Wickwire*, 54 N. Y. 226; *N. Y. & O. M. R. Co. v. Van Horn*, 57 id. 477; *People v. O'Brien*, 111 id. 1; *People v. Carnal*, 6 id. 463; *Long v. Stafford*, 103 id. 275, 282; *Spalding v. Congdon*, 18 Wend. 543; *Ryghtmyre v. Durham*, 12 id. 245; *Wood v. Keyes*, 6 Paige, 478; *Campbell v. Meiser*, 4 Johns. Ch. 344; *Snow v. Carpenter*, 54 Vt. 17; *Topley v. Goodsell*, 122 Mass. 177; *Paige's Estate*, 50 Cal. 40; *Richardson v. Green*, 130 U. S. 104; *Lawrence v. Hodgson*, 1 Y. & T. 372; *Freeman v. Tranah*, 12 C. B. 415.) The provision of the Code is mandatory. (Code Civ. Pro. § 1023; *Goetting v. Rihler*, 33 Hun, 500.)

Nelson S. Spencer for respondents. Chapter 688 of the Laws of 1894, repealing section 1023 and amending sections 993, 1022 and 1337 of the Code of Civil Procedure, is an act affecting the remedy, and, as such, applies to pending actions. (*Eggers v. M. R. Co.*, 27 Abb. [N. C.] 463, 478; *Shepard v. M. R. Co.*, 131 N. Y. 215; *Southwick v. Southwick*, 49 id. 510, 517; *Kelly v. Brownlow*, 22 J. & S. 129; *Wright v. Hale*, 6 H. & N. 227; *Kimbray v. Draper*, L. R. [3 Q. B.] 160; *Larkin v. Saffarans*, 15 Fed. Rep. 147; *Steubing v. N. Y. E. R. Co.*, 138 N. Y. 658, 661.) The order sought to be reviewed does not affect a substantial right and is not appealable to this court. (*Arthur v. Griswold*, 60 N. Y. 143; *Whitney v. Townsend*, 67 id. 40; *Taylor v. Roat*, 48 id. 687.)

ANDREWS, Ch. J. This is an equity action and was referred to a referee for trial and decision by an order entered May 27, 1893. The evidence was taken and the case was submitted to the referee for decision March 22, 1894. On the same day the defendants submitted to the referee proposed findings of fact and conclusions of law. The referee's time in which to make his decision was, upon his request, extended by stipulation to October 27, 1894. On the 22d day of October, 1894, he made and delivered his report in favor of the plaintiffs, stating generally the grounds of his decision. Intermediate the submission of the case to the referee and the making of his report, namely, on the 12th day of May, 1894, the legislature repealed section 1023 of the Code of Civil Procedure. That section authorized the attorney of either party to an action tried before a court or referee, before the cause is finally submitted for decision, or within such time afterwards and before the decision, as the court or referee may allow, to submit a written statement of the facts which he deemed established by the evidence and of rulings upon questions of law, which he desired the court or the referee to make. The section then declared: "At or before the time when the decision or report is rendered, the court or referee must note

in the margin of the statement the manner in which each proposition has been disposed of, and must either file or return to the attorney the statement thus noted." The referee did not note on the statement submitted by the attorney for the defendants the disposition of the propositions contained therein, and thereupon the defendants moved for an order requiring him to do so. The court at Special Term denied the motion, and from the order there made the defendants appealed to the General Term, where the order was affirmed, and from the order of affirmance they appeal to this court.

The only question is whether the repeal of section 1023 after the case was submitted to the referee for decision and after the defendants had submitted proposed findings of fact and law, operated to relieve the referee from the duty imposed by that section to note his disposition of the several propositions presented by counsel on the statement submitted. The learned counsel for the defendants rests upon the general rule that statutes are to be construed prospectively and not retrospectively, unless either by express words or necessary implication a different intention appears. The further ground is taken that the right of the defendants to have the referee pass upon the proposed findings accrued upon the submission of the statement, and that such right is saved from the operation of the Repealing Act by section 31 of the Statutory Construction Law of 1892, which declares that the repeal of a statute "shall not affect or impair any act done or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time such repeal takes effect, but the same may be asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such repeal had not been effected." It is incumbent on the defendants, as the first step in the argument based on the general rule adverted to, to show that if the repeal of section 1023 is held to relieve the referee from the duty imposed by that section, it will be, as to this case, retrospective legislation. But so far as the repeal operated upon the referee, it simply relieved him from a duty not yet performed, and which he was not bound to per-

form until the decision. The statute prescribed his duty in a certain contingency, and before the performance of the duty became imperative, and before he had performed it in fact the legislature repealed the statute imposing the duty. The statute as to him was prospective and not retrospective. Nor was it retrospective as to the defendants if by the general rule of law the procedure in an action is governed by the law regulating it at the time any question of procedure arises. It is well settled that the legislature may change the practice of the court and that the change will affect pending actions in the absence of words of exclusion. (*Southwick v. Southwick*, 49 N. Y. 510.) The court cannot under guise of an amendment or repeal of a statute cut off any substantial right of a party to have his case decided on the merits according to the law of the land. But it would be a very inconvenient rule, tending to great confusion, if a rule of practice existing when an action is commenced attaches itself to the substance of the right in litigation so that it could not be changed, or that a law changing procedure should be held inapplicable to subsequent proceedings in pending actions unless in terms made applicable thereto. It is the right of a party to have his case heard and decided in the orderly course of legal procedure, but he has no right to demand that the procedure prescribed when the action was commenced should remain unchanged. He prosecutes his action subject to the power of the legislature in matters of practice to abrogate rules existing when his action was brought, or make additional rules, and all subsequent proceedings will be governed thereby. The defendants when they submitted the proposed findings put themselves in a position in which, except for the repeal of section 1023, they would have been entitled to specific rulings on the propositions submitted. The section did not make it the duty of a party to submit proposed findings, but was permissive only. Under section 1022 it was made the duty of the court or referee trying the case to state in the decision or report, the facts found and the conclusions of law

separately, although no findings were submitted by either party. Section 1023 imposed an additional duty upon the court or referee in case proposed findings were submitted. But it was a duty relating to procedure only, and the repeal of the section after the defendants had submitted findings interfered with no legal right of the defendants, nor did the fact of the submission take the case out of the operation of the repealing statute. The defendants had no right to have the report or decision made except in such form or manner as the law required when the decision or report was made. The obligation of the court or referee to pass upon findings submitted was born of the statute and died with it. The case is brought within the effect of the Repealing Act, not because the repeal operates retrospectively, but because a law changing procedure applies thereafter as well to actions pending and undetermined when the law was passed as to actions subsequently commenced, unless the former are specially excepted.

The second ground taken by the defendants, that section 31 of the Statutory Construction Act of 1892 saves the case from the operation of the Repealing Act, is answered by what has been said. The only right which accrued to the defendants upon the submission of the proposed findings was the right to demand from the referee an observance of the provisions of section 1023. But it was a conditional right only, and the abrogation of the duty to pass upon the findings consequent upon a repeal of the section was not in any proper sense an impairment of any act theretofore done by the defendants or any right accrued to them. The change left unimpaired all defenses to the action. The repeal of the section acted directly and immediately upon the duty of the court or referee, and only incidentally upon the particular case in question. The defendants could no longer require the performance of the duty in their behalf, because the legislature had changed the procedure and abrogated the duty. The taking of a step under section 1023, which, if the section had remained in force, would have entitled them to demand the performance by the referee of the duty imposed thereby, was not an act

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Statement of case.

done which conferred a right, protected by section 37 of the Statutory Construction Act from the ordinary operation of the Repealing Act.

We think the order below was right and it, therefore, should be affirmed, with costs.

All concur.

Order affirmed.

THE PEOPLE ex rel. THE WESTERN ELECTRIC COMPANY, Appellant, v. FRANK CAMPBELL, Comptroller, etc., Respondent.

In proceedings by certiorari to review the action of the state comptroller in assessing so much of the capital of the relator as is employed in this state, it appeared that the relator, a corporation engaged in manufacturing telephone and telegraph apparatus, is an Illinois corporation, having its main office and principal manufactory in that state, but conducting an extensive manufacturing business in this state, and also purchasing and selling general electric supplies not manufactured by it. This it is authorized to do by its charter. *Held*, that the relator was not wholly engaged in carrying on manufacture in this state, and so, was not exempt by the Corporation Tax Act (§ 3, chap. 542, Laws of 1880, as amended by chap. 193, Laws of 1889) from taxation on the amount of its capital employed here.

People ex rel. v. Campbell (144 N. Y. 166), distinguished.

Reported below, 80 Hun, 466.

(Argued April 8, 1895; decided April 16, 1895.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made May 8, 1894, which affirmed a decision of the respondent, as comptroller of the state of New York, imposing an assessment upon the capital employed by the relator, a foreign corporation, in this state, and quashed a certiorari to review the same.

The facts, so far as material, are stated in the opinion.

Edwin T. Rice, Jr., for appellant. The comptroller erred in imposing a tax on so much of the capital of the relator as was

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156	590
145	587
158	167
158	178

employed in its manufacturing business. (*People ex rel. v. Campbell*, 144 N. Y. 166; *Comm. v. L. I. & C. Co.*, 129 Penn. St. 346; *Comm. v. Mann Co.*, 150 id. 64; *Comm. v. P. I. & S. Co.*, 156 id. 500; *Comm. v. J. C. Co.*, Id. 507; *Comm. v. S. F. B. Co.*, Id. 512; *Comm. v. N. O. Co.*, Id. 516; *People v. H. S. M. Co.*, 105 N. Y. 76.)

T. E. Hancock, Attorney-General, for respondent. The appellant is not a manufacturing corporation or company wholly engaged in carrying on manufacturing under the provisions of the New York corporation tax laws, and is subject to taxation upon the whole amount of capital employed in this state. (*People ex rel. v. Fire Comrs.*, 73 N. Y. 437.) The burden of proof was on the appellant to establish that it came within the statutory exemption, and to show that it was incorporated only for the purpose of manufacturing and transacting a business incident thereto. (*People ex rel. v. Campbell*, 144 N. Y. 166; *C. B. Co. v. City of New Orleans*, 99 U. S. 97; *Knapp v. O'Neill*, 46 Hun, 318; *Sherrill v. Hewitt*, 36 N. Y. S. R. 321; *Butler v. City of Oswego*, 56 Hun, 358.) The tax assessed against the corporation by the comptroller was not erroneous, and there was no overvaluation made in the appraisal made by him. (*People ex rel. v. Wemple*, 131 N. Y. 64; *People ex rel. v. Wemple*, 138 id. 583; *People ex rel. v. Wemple*, 133 id. 323; *People ex rel. v. Wemple*, 138 id. 587; *People ex rel. v. A. C. & D. Co.*, 129 id. 558; *People v. S. C. O. Co.*, 131 id. 64; *People v. S. T. C. Co.*, 133 id. 323.)

BARTLETT, J. The relator seeks in this proceeding to review, on certiorari, the assessment of taxes by the comptroller on its capital employed in this state for the years 1889, 1890, 1891 and 1892.

The Western Electric Company is an Illinois corporation with its main office and principal factory located in the city of Chicago, but it also conducts an extensive manufacturing and general business in the city of New York. In this state

it manufactures telephones and telegraph apparatus and also purchases and sells articles it does not manufacture which are used by telephone and telegraph companies, such as line wire, insulators and general electric supplies.

The counsel for the relator insists that the determination of the comptroller should be reversed for two reasons, viz.:

1. The relator is a manufacturing corporation wholly engaged in carrying on manufacture within this state.

2. Even if that position cannot be maintained, the tax imposed by the comptroller for each of the years under review is excessive in amount.

As to the first point it is urged that the relator's case is similar to that presented by the record in the *People ex rel. Tiffany & Co. v. Campbell* (144 N. Y. 166); that the relator is a manufacturing corporation of precisely the same character as Tiffany & Co., and is engaged in carrying on manufactures in the state of New York in the same manner.

The case of *Tiffany & Co.* is distinguishable from the case at bar and is not decisive of the question now presented.

Tiffany & Co. is a manufacturing corporation organized under the laws of this state for the manufacture and sale of gold and silverware and other articles of ornament and use; it employs about eighty per cent of its capital in this state, of which amount all except twelve or fifteen per cent is invested in its manufacturing business; the amount not employed in manufacturing is used in the purchase and sale of goods of foreign manufacture to make the stock complete and meet the demands of customers.

It was claimed that the amount so used in the purchase of foreign goods was incidental and subsidiary to the exercise of its corporate powers, and as a result that the entire amount of capital employed in this state was exempt from taxation.

This court refused to adopt that view and held that Tiffany & Co., within its corporate powers, was only a manufacturing corporation authorized to sell its own goods, and that the purchase and sale of goods it did not manufacture was *ultra vires*; that while the state could intervene to prevent this

usurpation of power if the public interests required it, the corporation was subject to a tax on its outside and unauthorized transactions; that as to its legitimate corporate business it was wholly engaged in carrying on manufacture within this state and the capital so employed was not taxable.

This is all that was decided in the case of Tiffany & Co.

In the case at bar we have a different state of facts.

It appears by the return to the writ of certiorari, and is not denied in this proceeding, that the relator is a corporation organized under the laws of the state of Illinois to manufacture, buy, sell, lease or otherwise procure, own and dispose of electric and electric telegraph and telephone instruments and apparatus of all kinds, and all parts of the same; to acquire by purchase patent and other rights and franchises; to acquire and dispose of capital stock of other corporations.

Under this grant of corporate power it is manifest that the relator is not only empowered to manufacture and sell its own goods, but is authorized to buy and sell electric and electric telegraph and telephone instruments and apparatus of all kinds and all parts of the same. Unlike Tiffany & Co., the relator is not confined to the manufacture and sale of its own products in its business conducted in this state, but in the purchase and sale of general electric supplies is acting strictly within its corporate powers.

It, therefore, follows that the relator is not wholly engaged in carrying on manufacture within this state, and, consequently, is taxable on the amount of its capital stock employed here.

If it seems a harsh and unwise rule that imposes upon a foreign corporation a tax upon a large amount of its capital that it brings into this state, and employs in a legitimate and prosperous manufacturing business which requires for its factory real estate valued at nearly a quarter of a million of dollars and gives employment to four hundred and fifty skilled workmen, it is a subject that should be brought to the attention of the legislature, as courts must enforce the law as written.

It would seem that a wise public policy should encourage manufacturers and so adjust taxation as to promote the investment of foreign capital within the state in manufacturing enterprises.

It now remains for us to consider whether the comptroller, in fixing the amount of capital employed within this state, as the basis of the tax imposed, has named an excessive amount; for the year 1889 he has determined the amount to be \$750,000, and for each of the other three years \$1,000,000.

It is the established rule, settled by the repeated adjudications of this court, that the determination of the comptroller must stand upon the question of valuation unless clearly shown to have been erroneous. (*People ex rel. A. C. & D. Co. v. Wemple*, 129 N. Y. 558; *People ex rel. Roebling's Sons Co. v. Wemple*, 138 id. 587.)

A careful examination of the record satisfies us there is evidence to support the determination of the comptroller.

The order appealed from should be affirmed, with costs.

All concur.

Order affirmed.

MEMORANDA

OF

CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS
VOLUME, WHICH ARE NOT REPORTED IN FULL.

THE PEOPLE ex rel. MARK L. SHELDON, Respondent, v. WAL-
TER FRASER et al., Assessors, etc., Appellants.*

(Argued January 28, 1895; decided February 26, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made December 6, 1893, which affirmed a judgment in favor of the relator entered upon a decision of the court on trial at Special Term.

L. Fraser for appellants.

James Gibson for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

In the Matter of the Appraisement of Certain Legacies and
the Assessment thereon of a Collateral Inheritance Tax
Under the Last Will and Testament of GEORGE W. CUL-
LUM, Deceased.

145b 593
148 313

(Submitted January 28, 1895; decided February 26, 1895.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made February 16, 1894, which affirmed an order of the surrogate of the county of New York assessing a tax on a legacy to the United States.

* Reported below, 74 Hun, 282.

Wallace Macfarlane and *Charles Duane Baker* for appellants.

Benj. F. Dos Passos for respondent.

Agree to affirm ; no opinion.

All concur.

Order affirmed. _____

MARY F. BAXTER, Appellant, *v.* THE NEW YORK STATE
MUTUAL BENEFIT ASSOCIATION, Respondent.

SAME, Appellant, *v.* SAME, Respondent.

SAME, Appellant, *v.* SAME, Respondent.

(Argued January 28, 1895 ; decided February 26, 1895.)

APPEALS from orders of the General Term of the Supreme Court in the fourth judicial department, made May 18, 1894, which reversed in each case an order of Special Term denying motion to vacate an attachment and which granted said motion.

James Devine for appellant.

Louis Marshall for respondent.

Agree to dismiss appeal ; no opinion.

All concur.

Appeal dismissed. _____

MARY J. RUNCIE, Respondent, *v.* MICHAEL SEITZ et al.,
Appellants.

(Argued January 28, 1895 ; decided February 26, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made September 11, 1894, which affirmed a judgment in favor of plaintiff entered upon an order of Special Term.

J. J. Bennett for appellants.

Isaac H. Maynard for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

In the Matter of the Application of THE MANHATTAN RAILWAY COMPANY et al., Respondents, v. JULIA A. KENT, Individually, etc., et al., Appellants.

(Argued January 28, 1895; decided February 26, 1895.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made the first Monday of October, 1894, which affirmed an order of Special Term denying a motion for a re-taxation of costs.

Charles L. Pashley for appellants.

William H. Godden for respondents.

Agree to affirm ; no opinion.

All concur.

Order affirmed. _____

ROBERT J. DEAN, Respondent, et al., Plaintiffs, v. MARSHALL S. DRIGGS, Defendant ; EDWARD S. HATCH, Appellant.

(Argued January 28, 1895; decided February 26, 1895.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 14, 1894, which affirmed an order of Special Term fixing the amount payable to Edward S. Hatch, as attorney.

Thomas P. Wickes for appellant.

L. E. Warren for respondent.

Agree to affirm on opinion below.

All concur.

Order affirmed.

THE PEOPLE ex rel. BRYANT W. DINSMORE, Appellant, v.
THOMAS F. GILROY et al., Respondents.

(Argued January 25, 1895; decided February 26, 1895.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made December 17, 1894, which affirmed an order of Special Term denying a motion for a mandamus.

Roger Foster for appellant.

David J. Dean for respondents.

Agree to affirm; no opinion.

All concur.

Order affirmed. _____

THE PEOPLE ex rel. BRYANT W. DINSMORE, Appellant, v.
THOMAS F. GILROY et al., Respondents.

(Argued January 28, 1895; decided February 26, 1895.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made December 17, 1894, which affirmed upon return of a writ of certiorari the proceedings of respondents constituting the board of estimate and apportionment of the city of New York upon the audit of a claim of Bryant W. Dinsmore.

Roger Foster for appellant.

David J. Dean for respondents.

Agree to affirm; no opinion.

All concur.

Order affirmed.

THE PEOPLE ex rel. ROSWELL W. KEENE, Respondent, v.
THE BOARD OF SUPERVISORS OF QUEENS COUNTY, Impleaded,
etc., Appellant.

(Submitted January 28, 1895; decided February 26, 1895.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made December 10, 1894, which modified, and affirmed as modified, an interlocutory judgment entered upon an order of Special Term in favor of plaintiff, and affirmed orders of Special Term denying motions to amend the judgment, and granted a motion by the relator for the costs at General Term.

F. H. Van Vechten for appellant.

Roswell W. Keene for respondent.

Agree to affirm ; no opinion.

All concur.

Order affirmed. _____

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v.
CHARLES FLAHERTY, Respondent.

(Argued January 29, 1895; decided February 26, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 17, 1894, which reversed a judgment convicting defendant of the crime of rape, entered upon a verdict of the Court of Sessions of Livingston county.

William Carter for appellant.

F. C. Peck for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

JULIA V. PAPE, as Executrix, etc., Respondent, v. JOSEPH L. SCHOFIELD et al., Appellants.*

(Argued January 29, 1895; decided February 26, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made April 17, 1894, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

William R. Page for appellants.

John Delahunty for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

HENRY A. BOWERMAN, Appellant, v. WARREN D. BOWERMAN et al., Respondents.†

(Argued January 30, 1895; decided February 26, 1895.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made February 15, 1894, which reversed a judgment in favor of plaintiff entered upon the report of a referee and ordered a new trial before another referee.

Horace Secor, Jr., for appellant.

William C. De Witt and *Payson Merrill* for respondents.

Agree to affirm order and for judgment absolute in favor of defendants upon stipulation on opinion below.

All concur.

Order affirmed and judgment accordingly.

* Reported below, 77 Hun, 236. † Reported below, 76 Hun, 46.

In the Matter of the Probate of the Paper Propounded as
the Will of MARY SNELLING, Deceased.

(Submitted January 31, 1895; decided February 26, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 14, 1894, which affirmed a decree of the Surrogate's Court of Suffolk county admitting to probate the will of Mary Snelling, deceased.

L. R. Beckley for appellants.

Thomas Young for respondents.

Agree to affirm, with costs to the executor payable out of the estate; no opinion.

All concur.

Judgment affirmed. _____

In the Matter of the Judicial Settlement of the Accounts of
CAROLINE E. PERKINS, as Executrix, etc.*

(Argued February 4, 1895; decided February 26, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 12, 1894, which affirmed a decree of the Surrogate's Court of the county of New York settling the accounts of Caroline E. Perkins, as executrix, etc.

George C. Lay for appellants.

Edward S. Rapallo for respondents.

Agree to affirm on opinion below.

All concur, except BARTLETT, J., not voting.

Judgment affirmed.

* Reported below, 75 Hun, 129.

CARRIE S. LOUNSBURY, as Administratrix, etc., Respondent, *v.*
WILSON P. FOSS, Appellant.

(Argued February 5, 1895; decided February 26, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made September 4, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Irving Brown for appellant.

Roger Foster for respondent.

Agree to affirm; no opinion.

All concur, except FINCH and GRAY, JJ., dissenting.

Judgment affirmed.

ISAAC O. WOODRUFF et al., as Executors, etc., Respondents, *v.*
ALFRED T. ACKERT et al., Appellants.

(Argued February 5, 1895; decided February 26, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 14, 1894, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

Alfred T. Ackert for appellants.

Alfred L. Manierre for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

JAMES C. CARWOOD, Respondent, *v.* JOHN K. VAN NESS,
Appellant.

(Argued February 5, 1895; decided February 26, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an

order made December 1, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Robert Payne for appellant.

William G. Cooke for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

In the Matter of the Application of JANE LE BRETON BRUGH,
an Alleged Lunatic.

(Argued February 6, 1895; decided February 26, 1895.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made October 23, 1891, which affirmed an order of Special Term confirming the report of a referee and superseded a commission of lunacy.

Also appeal from order of the same General Term, made January 18, 1894, which modified, and affirmed as modified, an order of Special Term auditing and settling the committee's accounts.

William G. Cooke for appellant.

Norris Morey for respondent.

Agree to affirm order confirming report of referee superseding commission, and dismiss appeal from order confirming report of referee settling accounts of committee; no opinion.

All concur.

Ordered accordingly. _____

ERNEST ST. GEORGE LOUGH et al., Survivors, etc., Appellants,
v. A. EMILIUS OUTERBRIDGE et al., Respondents.

(Argued June 20, 1894; decided October 9, 1894; re-argument ordered; re-argued February 7, 1895; decided February 26, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order

made April 14, 1893, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

This case is reported on former argument, 143 N. Y. 271; on re-argument, 144 id. 642.

Treadwell Cleveland for appellants.

Wilhelmus Mynderse for respondents.

Agree to affirm on opinion by O'BRIEN, J., on original argument (143 N. Y. 271).

All concur, except ANDREWS, Ch. J., and PECKHAM, J., dissenting.

Judgment affirmed. _____

ALANSON S. PAGE et al., Respondents, v. CHARLES G. ROEBLING, as Executor, etc., Appellant.

(Argued February 7, 1895; decided February 26, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made September 12, 1893, which affirmed a judgment in favor of plaintiffs entered upon the report of a referee, and also affirmed an interlocutory order by said referee refusing to correct or change his minutes, etc.

Willis B. Dowd for appellant.

David P. Morehouse for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

THOMAS O'BRIEN, Respondent, v. DAVID K. MCCARTHY et al., as Executors, etc., Appellants.*

(Argued February 8, 1895; decided February 26, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered

* Reported below, 71 Hun, 427.

upon an order made September 12, 1893, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

Louis Marshall for appellants.

C. G. Baldwin for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed. _____

JOHN B. EAGLE, as Administrator, etc., Respondent, v. ROCH-
ESTER PAPER COMPANY, Appellant.

(Argued February 8, 1895; decided February 26, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 20, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

George F. Yeoman for appellant.

P. Chamberlain, Jr., for respondent.

Agree to affirm; no opinion.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed. _____

ANN LEE, as Administratrix, etc., Appellant, v. JOHN VAN
VOORHIS et al., Respondents.*

(Argued February 8, 1895; decided February 26, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made June 20, 1894, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

George F. Yeoman for appellant.

John Van Voorhis for respondents.

* Reported below, 78 Hun, 575.

Agree to affirm on opinion below.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

EMMA M. HASKINS, as Administratrix, etc., Appellant, v.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD
COMPANY, Respondent.

(Argued January 25, 1895; decided March 5, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 20, 1894, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial at Circuit, and also affirmed an order denying a motion for a new trial.

John Gillette for appellant.

J. W. Dunwell for respondent.

Agree to affirm; no opinion.

All concur, except BARTLETT, J., dissenting, and FINCH and HAIGHT, JJ., not sitting.

Judgment affirmed.

NORRIS WINSLOW, as Trustee, etc., Appellant, v. THE CARTHAGE, WATERTOWN AND SACKETTS HARBOR RAILROAD COMPANY et al.

In the Matter of the Application of ADDISON L. UPHAM,
County Treasurer, Respondent.

(Argued February 25, 1895; decided March 12, 1895.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made November 20, 1894, which modified, and affirmed as modified, an order of Special Term which, among other things, directed a discontinuance of the action against the defendant, the Carthage, Watertown and Sacketts Harbor Railroad Company.

D. G. Griffin for appellant.

Hannibal Smith for respondent.

Agree to dismiss appeal on the ground that the order is not reviewable in this court; no opinion.

All concur, except O'BRIEN, J., taking no part.

Appeal dismissed.

THE CANADIAN AGRICULTURAL COAL AND COLONIZATION COMPANY (Limited), Respondent, v. JOSEPH L. SPOFFORD, Appellant.

(Argued February 25, 1895; decided March 12, 1895.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made December 14, 1894, which affirmed an order of Special Term directing defendant to furnish a bill of particulars.

Henry W. Hardon for appellant.

Edwin T. Rice, Jr., for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

In the Matter of the Petition of JOHN J. HOPPER to Punish EDWIN S. UPDIKE, SR., for Contempt of Court.

(Argued February 25, 1895; decided March 12, 1895.)

APPEAL from order of the General Term of the Court of Common Pleas for the city and county of New York, made January 2, 1894, which reversed an order of Special Term denying an application to punish Edwin S. Updike, Sr., for contempt and adjudged him guilty of contempt.

David McClure for appellant.

Edward Hassett for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

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THE PEOPLE OF THE STATE OF NEW YORK *v.* THE LIFE UNION.
HARRIET A. PINDELL et al., Appellants, *v.* THOMAS ASHWORTH,
et al., Respondents.

(Argued February 25, 1895; decided March 12, 1895.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made January 24, 1895, which affirmed an order of Special Term confirming the report of a referee.

Raphael J. Moses for appellants.

Edmund Luis Mooney and *M. P. O'Connor* for respondents.

Agree to affirm on authority of *In re Eq. R. F. L. Assn.* (131 N. Y. 354); no opinion.

All concur.

Order affirmed.

DONALD MACKAY, as Executor, etc., Respondent, *v.* ROWLAND B. DENNINGTON, as Administrator, etc., Appellant, Impleaded, etc., Respondent.

(Argued February 25, 1895; decided March 12, 1895.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made December 14, 1894, which affirmed an order of Special Term denying a motion by defendant to correct final judgment.

E. T. Rice for appellant.

James C. Hays, *Edward W. Ditmarsh* and *Sherman Evarts* for respondent.

Agree to affirm on opinion below.

All concur.

Order affirmed.

RAILROAD EQUIPMENT COMPANY, Respondent, v. MITCHELL S. BLAIR, as Receiver, etc., Appellant.

While a former judgment establishing rights and relations between the parties thereto is not admissible to defeat or divest any right existing in a person not a party or a privy, it is admissible against such person for the purpose of proving that the plaintiff in the former action sustained to the defendant the relation established by the judgment, and was clothed with whatever right the defendant had, which was awarded to the defendant by the judgment, saving only the right of the third person to impeach the judgment for fraud or collusion.

(Argued March 1, 1895; decided March 12, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made at the June term, 1893, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought to recover possession of seventy freight cars, alleged to be the property of plaintiff, and which had been taken possession of by defendant as receiver of the Rochester, Hornellsville and Lackawanna Railroad Company.

The following is the opinion in full:

"The right of the plaintiff to the possession of the seventy cars sought to be recovered in this action was resisted by the defendant, as receiver of the Rochester, Hornellsville and Lackawanna railroad, on the ground, *first*, that the plaintiff, as the assignee of Post, Martin & Co., had never acquired the right of possession as against the Central Construction Company, assuming that that company purchased and was vested with the title to the cars when they were delivered to the Lackawanna and Pittsburgh Railroad Co., October 11, 1886, and, *second*, that the Central Construction Company purchased the cars for the Rochester, Hornellsville and Lackawanna Railroad Co., and that the title was in that company when the contracts between Post, Martin & Co. and the Central Construction Company of October 16, 1886, under which the plaintiff claims, were made, and that Post, Martin & Co. acquired no rights thereunder as against the Rochester, Hornellsville and Lackawanna Railroad Co. The referee found against the defendant on the question of title, and found

as a fact that the cars were purchased by the Central Construction Company, and were owned by that company October 16, 1886. If this finding is supported by evidence, it is conclusive on this appeal. The documentary evidence shows a purchase of the cars by the Central Construction Company. By written contract of June 25, 1886, the firm of Colwell and Canning agreed to sell and deliver to the Construction Company in August and September of that year the seventy cars at prices specified, to be paid for in cash and in the bonds and stock of the Rochester, Hornellsville and Lackawanna Railroad Co. The payments were made by the Construction Company according to the terms of the contract, as appears by the written receipts given in evidence, the last payment having been made October 1st, 1886. The cars were delivered on the 11th day of October, 1886, by the direction of the Construction Company, on the tracks of the Lackawanna and Pittsburgh Railroad Co., at Angelica, of which latter road one George D. Chapman was in possession as receiver, he at the same time being the general manager of the Construction Company, and also a director in the Rochester, Hornellsville and Lackawanna Railroad Co. The company last mentioned was organized to build a short line of road connecting with the Lackawanna and Pittsburgh railroad, the construction of which had not at that time been commenced. The Construction Company had entered into a contract with the former company to build and equip the road and to receive the bonds and stock of the road in payment. There is no finding and no direct proof that the cars prior to October 16, 1886, had been delivered to the Rochester, Hornellsville and Lackawanna Railroad Company. The defendant proved circumstances which might have justified the inference that in purchasing the cars the Construction Company was acting as agent for the railroad company. They were mainly paid for in the bonds and stock of the company, which inferentially the Construction Company had received under its contract to build and equip the road. The freight charges on the cars from Pennsylvania to Angelica were paid by the Rochester, Hornellsville and Lackawanna Railroad Co. and an account was kept by the Lackawanna and Pittsburgh Railroad Co. in which the other company was credited

for the use of the cars prior to the completion of its road. The cars were marked with the initials, 'R. H. & L. R. R. Co.' Other circumstances were shown on the part of the defendant in support of the claim that the cars were manufactured for and belonged to the Rochester, Hornellsville and Lackawanna Railroad Co. But upon the whole evidence the question of title as between the Construction Company and the railroad company was a question of fact, not determinable by any decisive evidence on either side, and the decision of the referee upon the point is conclusive here.

"It only remains to consider whether any erroneous evidence was admitted on the trial against the exception of the defendant, or any competent evidence offered by him was rejected to his prejudice. There is but one question on this branch of the case requiring special notice, and this bears exclusively on the point whether the plaintiff showed any right to maintain an action to recover possession, assuming that the title to the cars was in the Construction Company October 16, 1886, when the contracts between the company and Post, Martin & Co. were made. The claim was that even if the defendant company did not own the cars and were not entitled to possession as against the true owners, the present plaintiff as the assignee of Post, Martin & Co. did not represent the possessory right of the Construction Company. It appears that October 16, 1886, Post, Martin & Co. loaned the Construction Company \$15,000 on the security of the seventy cars, without notice of any claim thereto adverse to that of the Construction Company. Under advice of counsel the Construction Company transferred the seventy cars to Post, Martin & Co. by a bill of sale absolute in form. The firm then executed to the Construction Company a lease of the cars, reserving rent payable in installments, which when fully paid would repay the loan and interest, and meanwhile and until default the Construction Company was entitled to the use and possession of the cars. Subsequently Post, Martin & Co. assigned their rights under their contracts to the American Car and Equipment Company, the predecessor of the present plaintiff. Default having been made by the Construction Company in the payments of the rents reserved, the

Car and Equipment Company brought an action of replevin against the Construction Company to recover the possession of the cars, based on the contracts of October 16, 1886, and recovered judgment therein prior to the commencement of the present action, whereby the title and possession was adjudged to be in the plaintiff in that action, the Car and Equipment Company. This judgment was offered in evidence by the plaintiff on the trial of the present action and received against the objection of the defendant, and this is alleged to have been error on the ground that the Rochester, Hornellsville and Lackawanna Railroad Company was not a party to the former action and was not bound by the judgment therein. The circumstances under which the judgment was offered and received were these: The plaintiff having put in evidence the bill of sale to Post, Martin & Co., and the lease back to the Construction Company, the defendant's counsel moved to dismiss the complaint on the ground, among others, that it appeared from the evidence 'now offered, that the plaintiff is not entitled to the possession of the property.' The plaintiff then offered in evidence the judgment roll in the former action, under objection and exception. We think the judgment roll was competent evidence to establish that the plaintiff had extinguished the right of possession of the Construction Company under the lease of October 16, 1886, and that as against that company it had the right of possession of the cars. The general and well-settled rule that a judgment binds only parties and privies is unquestioned. But there is an exception to this rule as firmly settled as the rule itself, and that is that a former judgment establishing rights and relations between the parties to that judgment, while it is never admissible to defeat or divest any right existing in a person not a party or privy thereto, is admissible against such person for the purpose of proving that the plaintiff in the former judgment sustained to the defendant therein the relation established thereby, and was clothed with whatever right the defendant therein had, which was awarded to the plaintiff by the judgment, saving only the right of the third person to impeach the former judgment for fraud or collusion. In the present case the controversy arose as to the title and

right of possession of the seventy cars. The former judgment could not determine as between these parties that the title was in the Construction Company when the agreement of October 16, 1886, was made, but it was competent evidence that the plaintiff in that judgment, and by force thereof, extinguished any right of the Construction Company under the lease, and had acquired as against that company any right it had to the possession of the cars. It in no way determined the claim of the defendant here that the road he represents had a title prior to, and paramount to the alleged title of the Construction Company. The real right in issue in this case was not affected by the former judgment. It did determine, however, as between these parties that the plaintiff stood in the shoes of the Construction Company to assert whatever title and right of possession it had as against the defendant. The judgment may incidentally affect the situation of the defendant to raise in this action a technical defense, not founded upon any right of property vested in him, but it was not for this reason incompetent. There are many cases where a former judgment is admissible against third persons not parties or privies. It may form a link in a chain of title and be the foundation of a subsequent conveyance. The party claiming under the judgment may prove it as one of the muniments of his estate. In a creditor's bill the judgment received by the plaintiff is conclusive against the party whose conveyance is sought to be set aside for fraud of the existence and amount of the plaintiff's debt, and the defendant is not permitted to impeach it for error of fact or law in the absence of fraud or collusion. The former judgment in this case operated as a transfer from the Construction Company to the Car and Equipment Company of all its rights, and has the same force as if it had been made by an instrument in form executed by the Construction Company to the plaintiff in the judgment. (*Barr v. Gratz*, 4 Wheat. 213; *Candee v. Lord*, 2 N. Y. 269; *Raymond v. Richmond*, 78 id. 351; *Canaan v. Greenwoods Turnpike Co.*, 1 Conn. 1; Black on Judg. § 607; Bigelow on Estp. 149 *et seq.*)

"The case of *Hassall v. Wilcox* (130 U. S. 493) illustrates the distinction in the cases. In that case the question was one of priority of liens. One party relied upon the judgment of

a state court adjudging him priority of lien over all other claims on the property and equipment of a railroad in an action to which the holder of a prior mortgage was not a party, and it was held that as against the mortgagee and bondholders the judgment of the state court adjudging the priority of lien was not binding.

"We perceive no legal ground for disturbing the judgment below, and it should, therefore, be affirmed, with costs."

Frank Sullivan Smith for appellant.

Gherardi Davis for respondent.

ANDREWS, Ch. J., reads for affirmance.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

JOHN W. TRUESDELL, as Administrator, etc., Respondent, *v.*
HANNIE L. BOURKE, as Executrix, etc., Appellant.

Where fraud is alleged as the basis of an action it must be proved; a recovery may not be had on proof of a right of action on contract, or of some other character, although facts are proved which, in a proper form of action, would justify the recovery.

Where in an action under the act of 1858 (Chap. 514, Laws of 1858) by an administrator whose intestate died insolvent to disaffirm an alleged transfer of property alleged to have been made by the intestate in fraud of creditors, it appeared that the money in question was paid by a third person to B., defendant's testator, who was the pastor and treasurer of a church, to be used for church purposes in performance of a promise made by said intestate, and that the money was paid by B. upon a mortgage on the church property, the complaint alleged and the answer admitted a demand by plaintiff for the money, but it did not appear that at the time of the demand B. was informed of the facts upon which plaintiff based his claim. *Held*, that the demand was insufficient to charge B. with notice.

Truesdell v. Bourke (80 Hun, 55), reversed.

(Argued February 8, 1895; decided March 19, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made July 10, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

The following is the opinion in full:

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j170	1537
j170	1538

"This action was commenced in May, 1885. The original defendant was William J. Bourke, a Catholic priest, and the pastor of the church of St. John the Baptist in Syracuse, who died in April, 1887, and the present defendant is the executrix of his will, having been substituted as defendant after the death of her testator and after the action had been pending for more than two years. The parties seem to agree that the action is brought under ch. 314 of the Laws of 1858, which gave a new remedy to the administrator of a person who died insolvent by permitting him to 'disaffirm, treat as void and resist all acts done, transfers or agreements made in fraud of the rights of any creditor.' This, of course, refers to transfers of property made by the deceased in his lifetime, and the administrator is authorized to question them or to set them aside in behalf of creditors, though they may have been binding upon the deceased himself. It is quite clear that the complaint states a case within the statute. It alleges that one John Fitzgerald died intestate and insolvent on the 28th of February, 1882, and then, after stating that the plaintiff was appointed his administrator on April 11, 1882, and that deceased at the time of his death owed debts in a large amount which he was unable to pay, it proceeds to aver and state the actionable facts as follows: 'That being so indebted, and with intent to hinder, delay, cheat and defraud his said creditors, and being then the owner of and in possession of about \$8,000 in money, the said John Fitzgerald deposited it in a bank in Syracuse, in the name of one Kate Fitzgerald, keeping in his possession and under his control the bank book representing said deposit. * * * The plaintiff further alleges that said Kate Fitzgerald, shortly after the death of said John Fitzgerald, discovered said bank book among the effects of said deceased, and wrongfully and unlawfully took the same and drew out said money from said bank and appropriated the same to her own use with the intent to cheat and defraud the creditors of said John Fitzgerald out of the same, and without any claim or right, title or interest therein.'

"It then avers that in March, 1882, the defendant received from Kate Fitzgerald the sum of \$1,000 so deposited in bad

faith with intent to hinder, delay and defraud creditors, and with knowledge of all the facts.

"There can be no doubt with respect to the character and scope of the action. It is based upon allegations of actual fraud perpetrated first by Fitzgerald in depositing the money to the credit of his niece Kate, then by her in procuring the bank book and drawing it out, and, finally, by Father Bourke in receiving it from her in bad faith with knowledge of all the facts, and with the intent to defraud creditors.

"All these allegations of the complaint were put in issue by the answer, and the fundamental objection to the judgment, which the plaintiff has recovered, is that the complaint is unproved not in some particular or particulars only, but in its entire scope and meaning, and hence it is not a mere variance but a failure of proof. (Code, § 541.) There is not the slightest proof in the case that the deceased debtor ever deposited any money in any bank to the credit of his niece or any one else, or that he ever saw the pass book, or that she ever had it or drew any money from any bank, or that either she or Father Bourke had any knowledge that the deceased owed any one a dollar at the time of his death. It was shown that the debts of the deceased existed in judgments of long standing which had been docketed in the clerk's office, and that all the parties to the fraud alleged lived in the same ward and attended the same church, but surely this could not be either actual or constructive notice of the facts constituting the fraud. There is, indeed, proof of two facts in support of the complaint. One is that the deceased debtor was insolvent, and the other is that Father Bourke received from Kate, the niece of the deceased, about a month after his death, the sum of \$1,000 in performance of a promise which the uncle had made to him some months before, to contribute that sum in aid of the building of a parochial schoolhouse upon the church property, but that was only one step in the direction of establishing the allegations of the complaint.

"It appeared that the deceased clergyman paid this money upon a mortgage which a savings bank held against the church property on the 8th of July, 1882. The learned trial judge, under the objection and exception of counsel for the

defendant, submitted two questions to the jury: First, whether Father Bourke, when he received the money, was a party to the alleged fraud, of which, as we have seen, there was no evidence upon which that fact could have been found. Secondly, whether, though innocent of any fraud or wrong when he received it, he had not received notice of the fact constituting the alleged fraud before he paid the money upon the mortgage, and if he had then he was liable. There was no proof of any actual notice to him of the fact at any time or in any form. The complaint alleged and the answer admitted that before the commencement of the action, which was on May 28, 1885, the plaintiff demanded the money. This it should be observed was nothing more than a bare demand without any information as to the facts upon which the plaintiff's right was founded. The defendant was the treasurer of the church, and if he received it in good faith he was guilty of no wrong in paying it over, unless, at the time, he knew that some other person had a better right to it in law or equity. In such cases it would seem to be reasonable that a demand should be accompanied with information as to the facts. (*Gillet v. Roberts*, 57 N. Y. 28.) The learned judge, following the theory of the complaint, instructed the jury that if at the time the payment was made upon the mortgage the original defendant had no knowledge of any fraud on the part of the deceased debtor, or his niece, then there could be no recovery in the case. There were but two items of evidence on this point. One was the statement of a witness that Father Bourke had admitted to him that he had received the money, but *might have to pay it back*. It would be quite difficult to say that this expression imputed knowledge on the part of the person who used it of any fraud whatever, but if it was used after the money had been paid out on the mortgage, it was obviously of no significance. When the witness was pressed to fix the time when the demand was made his testimony was quite indefinite, and to say the least was just as consistent with a time subsequent to July 8th as a date before, and hence could not sustain a finding of knowledge before payment. The other piece of evidence was a provision in the will of Father Bourke made in 1887, more than five years

after he had received the money and two years after the commencement of this action. This provision is to the effect that there was then deposited in a bank \$1,000 which *belonged* to the school unless a judgment was rendered against him in this action in which event it was to be applied in satisfaction thereof.

"The jury were permitted to inquire whether this was not an admission that he then had the money in question, and, also, whether it did not tend to contradict or impeach his testimony that he had paid it on the mortgage five years before. The language does not warrant any such inference. Its meaning and purpose is quite obvious and it is entirely consistent with the testimony. The testator had received this money, and, as he said, had applied it upon the mortgage when it was intended for the school. The will simply provided that it should be replaced by a like sum, then on deposit, unless he or his estate was compelled to restore it. It is not an admission that he then had the money which had been paid to him by the niece of the deceased debtor, nor did it tend, in the slightest degree, to contradict or impeach his testimony. So that upon the question of knowledge of the alleged fraud, prior to the time that the money was paid upon the mortgage, there was really no evidence upon which to base a finding by the jury.

"It is quite clear that this action has been projected and tried upon an erroneous theory. The learned counsel for the plaintiff has abandoned it in his argument in this court, and he now suggests quite a different state of facts upon which to uphold the judgment. He ignores entirely any such thing as a disposition by gift or transfer on the part of the debtor in his lifetime, but, on the contrary, assumes that he owned and was in possession of the money at the time of his death, and that afterwards, in some way, it came to the hands of his niece, who was induced by the priest to give to him \$1,000 of it upon the claim that the uncle had promised him that sum. If it could be said that these facts were pleaded and found this judgment would clearly have a more substantial basis to sustain it. It would not be necessary then for the plaintiff to call to his aid any of the provisions of the act of 1858.

"The title to money or other personal property which a deceased person owns at the time of his death passes to his administrator, in case of intestacy, when appointed, as of the time of the death. (*Rattoon v. Overacker*, 8 Johns. 126; *Priest v. Watkins*, 2 Hill, 225; *Stuber v. McEntee*, 142 N. Y. 203.) If, intermediate the death and the granting of letters, a stranger or any third party, without authority, collects, receives or appropriates any of the assets, they become liable to account for the same as administrators *de son tort* to the true personal representatives of the deceased. This I conceive to have been the law from the earliest times. (1 Williams on Ex. 296 [6th Am. ed.]; Schouler on Ex. § 184; *Thorp v. Amos*, 1 Sandf. Ch. 26; *Scoville v. Post*, 3 Edw. Ch. 203; *Van Horn v. Fonda*, 5 Johns. Ch. 388; *Campbell v. Tousey*, 7 Cow. 64.) The principle was long ago embodied in a statute (2 R. S. 81, § 60) and is now § 2706 of the Code, which reads as follows: 'Every person becoming possessed of property of a testator or intestate, without being thereto duly authorized as executor or administrator, is liable to account for the full value of such property to any person entitled thereto, and shall not be allowed to retain or deduct therefrom any debt due to him.' An action for money had and received or to account upon the special facts or for a tort if warranted by the facts, is all that is essential in such a case. It is plain that such is not the action which the plaintiff brought. This action is based upon fraud, and the plaintiff, before he can recover, must prove the complaint or substitute another in its place. (*Salisbury v. Howe*, 87 N. Y. 128.) Where fraud is alleged as the basis of the action it must be proved. The law will not permit a recovery by proof of a right of action upon contract or of some other character, and this though facts may be stated or may appear which in proper form might sustain such an action. (*De Graw v. Elmore*, 50 N. Y. 1; *Ross v. Mather*, 51 id. 108; *Barnes v. Quigley*, 59 id. 265.) It was the theory of the action, disclosed by the complaint, that the learned trial judge submitted to the jury. The fact, which is undisputed, that Father Bourke received from the debtor's niece, after his death, \$1,000 in fulfillment of his promise to donate that amount for

the school would, in a proper form of action, go far to make him liable to account for it, but that fact alone would not be sufficient. Other facts should appear which are not contained in this record. There is no proof that the deceased debtor had any money at the time of his death, and none to show how the money which his niece gave to Father Bourke came to her possession. If it came to her possession through a disposition by gift or other transfer made by her uncle in his lifetime, valid between themselves, though void as to creditors, then her possession was not wrongful, at least until the transaction was disaffirmed, and the priest would not be personally liable for receiving the money in ignorance of any fraud after he had paid it into the treasury of the church in good faith. On the other hand, if the niece simply abstracted the money from the effects left by her uncle, then her possession was wrongful and she could give no title to another receiving it without legal consideration, though an innocent agent through whose hands it passed might be protected. In such a case, when the property consists of current money, the ultimate beneficiary, without consideration, would be liable. (*Sprights v. Hawley*, 39 N. Y. 441.) What the real facts are as bearing upon the nature of the possession by the niece it is impossible even to conjecture. If we look at the complaint, sworn to by the plaintiff after full opportunity to ascertain all the facts, the transaction is plain enough, but all we can learn from the proofs is that she had this money either in specie or in a check and gave it to the clergyman for the purposes stated.

“It is plain that we cannot affirm this judgment without disregarding the complaint entirely and then assuming certain facts upon another theory of the case, which are not conclusively established, and were not submitted to or passed upon by the jury. Moreover, even if we had the power to thus change the whole scope and theory of the action, it would be manifestly unjust to burden the defense with the costs of a litigation which, thus far, has proceeded upon a mistaken theory, or at least upon a theory which has not been sustained, and so we think that the fairest course is to remit the case for a new trial.

"The judgment should be reversed and a new trial granted, costs to abide the event."

Louis Marshall for appellant.

C. G. Baldwin for respondent.

O'BRIEN, J., reads for reversal.

All concur, except GRAY and BARTLETT, JJ., dissenting.

Judgment reversed.

ELLEN I. BALLARD, as Executrix, etc., Respondent, v. THE
HITCHCOCK MANUFACTURING COMPANY, Appellant.*

(Argued February 27, 1895; decided March 19, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made the second Tuesday of September, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

O. U. Kellogg for appellant.

Franklin Pierce for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

MARGARET BYRNE, as Administratrix, etc., Respondent, v.
THE BROOKLYN CITY AND NEWTOWN RAILROAD COMPANY,
Appellant.

(Argued February 28, 1895; decided March 19, 1895.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made December 26, 1893, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

* Reported below, 71 Hun, 582.

Matthew Hale for appellant.

J. Stewart Ross for respondent.

Agree to affirm ; no opinion.

All concur, except PECKHAM, J., not voting.

Judgment affirmed.

LUDWIG BAUMAN, Respondent, v. ELIZABETH MOSELEY, as
Administratrix, etc., Appellant.*

(Argued February 28, 1895; decided March 19, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 17, 1893, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

Henry L. Brant for appellant.

William H. Shepard for respondent.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

UNITED STATES TRUST COMPANY of New York, as Substituted
Trustee, etc., Appellant, v. PHILIP V. R. STANTON,
Impleaded, etc., Respondent.

(Argued March 5, 1895; decided March 19, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 12, 1894, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term, dismissed the complaint and awarded final judgment in favor of defendant.

* Reported below, 73 Hun, 40.

Edward W. Sheldon for appellant.

Josiah T. Marean for respondent.

Agree to affirm on the defense of the Statute of Limitations ; no opinion.

All concur, except GRAY and BARTLETT, JJ., dissenting.

Judgment affirmed.

MARY MCGREEVY, as Administratrix, etc., Respondent, v.
BUFFALO RAILWAY COMPANY, Appellant.

(Argued March 4, 1895; decided March 19, 1895.)

APPEAL from judgment of the General Term of the Superior Court of Buffalo, entered upon an order made July 2, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Porter Norton for appellant.

Harry D. Williams for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

MARIA L. DAVIS, as Administratrix, etc., Respondent, v. THE
NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY,
Appellant.

(Argued March 4, 1895; decided March 19, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 14, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Lewis E. Carr for appellant.

Frank Comesky for respondent.

Agree to affirm ; no opinion.

All concur, except PECKHAM and GRAY, J.J., dissenting.

Judgment affirmed.

In the Matter of the Accounting of JOSEPH POOL, as Assignee,
etc.

(Argued March 5, 1895 ; decided March 19, 1895.)

APPEAL from judgment of the General Term of the Court of Common Pleas of the city and county of New York, entered upon an order made May 7, 1890, which affirmed a judgment entered upon an order of Special Term confirming the report of a referee upon the accounting of Joseph Pool as assignee for the benefit of creditors of Hiram Pool.

James W. Hawes for appellant.

Herman Aaron for respondent.

Agree to affirm ; no opinion.

All concur, except BARTLETT, J., not sitting.

Judgment affirmed.

BENJAMIN CROSBY, Respondent, v. WILLIAM H. CLARK, as
Executor, etc., Appellant.

(Argued March 5, 1895 ; decided March 19, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 27, 1894, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

William Vanamee for appellant.

Daniel Finn for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

In the Matter of the Assignment of ARTHUR E. BATEMAN for the
Benefit of Creditors.

Claim of LEWIS CLEPHANE.*

(Argued March 7, 1895; decided March 19, 1895.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made April 2, 1894, which affirmed a judgment entered upon an order of Special Term confirming the report of a referee, which decided that the claimant above named was not entitled to participate in the distribution of the estate of Arthur E. Bateman, who had made an assignment to John A. Garver for the benefit of his creditors. The claim, as presented to the assignee, was for the value of certain bonds alleged to have been delivered to Bateman to secure the performance of certain conditions in a contract, which conditions had been performed and delivery of said bonds demanded by claimant prior to the assignment. To prove his case the claimant put in evidence a contract between himself and one Hood, whereby, in consideration of the sale of a railroad to him, Hood agreed to deliver to the claimant certain bonds. The referee found that the sale was made as proved, and that claimant received the consideration agreed upon, except the bonds in question here; that Bateman was not a party to the transaction, and never held any of the bonds belonging to claimant, and was not individually indebted to him.

The following is the opinion in full:

"There are said to be two questions of fact in this case, although involving quite inconsistent positions. One is whether Bateman held the ten bonds claimed as due to the plaintiff in the character of a bailee bound to deliver them; and the other whether he owed the bonds as a debt because he was the undisclosed principal in plaintiff's contract with Hood. Waiving for the present the inconsistency thus developed, it remains true that the referee's findings negative

* Reported below, 7 Misc. Rep. 688.

both the asserted facts, and are beyond our review because supported by evidence. They require attention, however, since they are more or less involved in objections taken to the referee's rulings upon the trial.

"It is first urged that proper evidence tending to show that Bateman was the real purchaser in plaintiff's sale of the railroad to Hood was erroneously excluded. To appreciate the referee's ruling we must recall the situation existing when it was made. Plaintiff's written claim put before the referee was wholly against Bateman as bailee. After stating the amount sought to be recovered, the plaintiff proceeds thus: 'Said Bateman, at the time of his assignment, held said bonds which had theretofore been delivered to him to secure the performance of certain conditions. Prior to his assignment, such conditions had been duly performed and the delivery of said bonds, coupons and interest had been duly demanded, but such delivery was not made.' If there was or could be the least doubt as to the meaning of this claim it was dissipated at the opening of the trial, for the first thing done on behalf of plaintiff was to put before the referee the affidavit of the plaintiff in which he tells his whole story and sets out in detail the facts and circumstances upon which he relies. In that paper Bateman is charged as bailee violating his duty, the written contract with Hood is annexed, and there is no pretense or suggestion of any other ground of liability. In this state of the case plaintiff called Bateman as a witness. On his direct examination he testified that he never had the bonds, and that the sale of the railroad was to Hood. The claimant then asked: 'State, if you can, the circumstances surrounding the agreement entered into by Lewis Clephane and one Peck, attorney in fact of Calvin Hood.' The evidence was objected to on the ground that the agreement was in writing, and is in evidence, and speaks for itself. The objection was sustained, and there was an exception. The ruling was clearly right. The offer itself was loose and broad, stating no purpose and confined to no point, obviously immaterial to any known issue in the case, and improper in the face of the writing itself. But the claimant now says he wanted to show that Bateman and not Hood was the real pur-

chaser. Then he should have said so. He should have made that offer. He should have stated the new and unsuspected and wholly inconsistent issue which he meant to interject into the case, and asked a ruling in the light of it. Not having done so, but concealing the purpose if he had it at all, he cannot now avail himself of it to defeat the ruling, perfectly proper and just under the circumstances which surrounded it, and when it was made. To hold otherwise would be to condone what would operate as a fraud upon the referee.

"Later Clephane himself was called as a witness and was asked: 'With whom did you conduct the negotiations leading up to that sale?' That was objected to again and the objection was sustained. There was no exception; and if one had been taken the observations already made would again be applicable. There is a further answer to the criticism of these rulings contained in the opinion of the General Term, but, wholly independent of that, I think the claimant never put himself in position to raise the question of error upon which he now relies.

"What has been said is one answer to the claimant's exception which questioned the referee's refusal to admit an offered telegram. It preceded the sale of the road, and appeared to form an element of the negotiations ending in such sale, and there was no sufficient proof of the genuineness or authenticity of the paper. If such proof was possible by the method suggested in the testimony, it was not furnished.

"We discover no ground for reversal, and the judgment should be affirmed, with costs."

William H. Stayton for appellant.

Matthew Hale for respondent.

FINCH, J., reads for affirmance.

All concur.

Judgment affirmed.

THE PEOPLE ex rel. PATRICK READY, Respondent, v. THE
MAYOR AND COMMON COUNCIL OF THE CITY OF SYRACUSE,
Appellants.

(Submitted March 11, 1895; decided March 19, 1895.)

MOTION to amend remittitur.

T. E. Hancock for motion.

Charles E. Ide opposed.

Agree to amend remittitur so as to allow the relator to recover interest on the amount adjudged to be paid over to him from August 8, 1890, the date of the commencement of the proceedings, and that no further damages be awarded, with ten dollars costs. No opinion.

All concur.

Motion granted and ordered accordingly.

GILBERT MURDOCK, as Administrator, etc., et al., Respondents,
v. HARRIET ROBINSON, Impleaded, etc., Appellant.

(Submitted March 11, 1895; decided March 19, 1895.)

MOTION to amend remittitur.

E. M. Harris for motion.

Lynn J. Arnold opposed.

Agree to amend remittitur so as to declare "that the judgment be affirmed so far as it affects the part of the premises owned by the Lamb heirs, and that it be reversed as to the part of the premises owned by Clarissa Waterman," and in other respects that the motion be denied. No opinion.

All concur.

Ordered accordingly.

CHARLES M. SMITH, as Executor, etc., Respondent, v. GEORGE B. NORTHRUP, Appellant.

(Argued March 6, 1895; decided March 22, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made July 11, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Charles H. Searle for appellant.

Charles R. Carruth for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

MARY E. BECRAFT, as Administratrix, etc., Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

(Argued March 6, 1895; decided March 22, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made July 10, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

C. D. Prescott for appellant.

Nelson Zabriskie for respondent.

Agree to affirm; no opinion.

All concur, except FINCH, J., not voting

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
CHARLES F. WILSON, Appellant.

145	628
173	147

(Argued March 7, 1895; decided April 9, 1895.)

APPEAL from judgment of the Court of Oyer and Terminer of the county of Onondaga, entered upon a verdict rendered September 24, 1894, convicting defendant of the crime of murder in the first degree, and also from an order of said court denying a motion for a new trial.

The following is the opinion in full :

"On the 31st day of July, 1893, James Harvey, a detective and member of the Syracuse police force, was shot and instantly killed on a public street in that city at ten o'clock in the forenoon. The tragedy was witnessed by a number of citizens. Two brothers, Lucius R. Wilson, and this defendant, Charles F. Wilson, were jointly indicted for murder in the first degree as the alleged perpetrators of the crime.

"The defendants demanded separate trials. Lucius R. Wilson was tried, convicted, the judgment affirmed by this court and sentence of death duly executed.

"In September last this defendant was convicted of murder in the first degree at the Onondaga Oyer and Terminer and we are now called upon to review that judgment.

"The learned counsel for the defendant introduced no evidence on his behalf. The material facts are few and simple.

"On the night of Sunday, June 4, 1893, the shoe store of McBride & Co., on South Salina street, was entered by burglars, the safe opened and about \$600 in money taken, including a quantity of silver in quarter dollar pieces, dimes and nickels.

"On the Friday and Saturday preceding the burglary three strangers had taken meals together in Palmer's restaurant. Two of these strangers were the Wilson brothers, but the identity of the third has never been disclosed. On the Monday following the burglary the same three strangers again visited the restaurant, coming in separately, but eating their meal together.

"Their bill was three dollars, and it was paid with three quarters, five nickels and twenty dimes.

"The three strangers then disappeared from the city of Syracuse.

"The proprietor of the restaurant had his suspicions aroused by the facts already narrated, and he conferred with McBride and the police officials as to the possibility of the three strangers being implicated in the burglary of the previous Sunday night.

"It was finally arranged that if the suspected men should again visit the restaurant Palmer was to communicate with police headquarters and they would be placed under arrest.

"Detective Harvey was advised of the situation and instructed to make the arrest if the opportunity presented.

"On the morning of the murder, between nine and ten o'clock, the Wilson brothers again appeared in Palmer's restaurant and ordered breakfast. Palmer at once telephoned police headquarters, and in a few minutes Detective Harvey appeared upon the scene.

"At the time of Harvey's arrival the Wilson brothers were eating their breakfast. Harvey desired to make the arrest at once, but Palmer asked him to wait until the men had left the restaurant.

"A brief description of the location of the restaurant and police station is essential to a proper understanding of the closing scenes in this tragedy.

"Water street runs east and west, Warren street north and south.

"Mann's tea store is located at the southeast corner of Water and Warren streets, facing west on Warren street.

"The police station is on Water street, one block east of Mann's store and on the same side of the street.

"Palmer's restaurant is two blocks south of Mann's store on the east side of Warren street.

"Harvey was killed on Water street, about two hundred and fifteen feet east of Mann's store and one hundred and sixty feet west of the police station.

"When the Wilson brothers left Palmer's restaurant they proceeded north, on Warren street, in the direction of Mann's store, which was two blocks distant.

"Harvey followed them and when opposite Mann's store he

tapped them on the shoulders and the three stepped into the doorway of the store where they apparently engaged in a quiet conversation lasting from one to three minutes, according to the testimony of several witnesses who saw the transaction, but were not near enough to hear what was said.

"No witness was produced who heard this conversation.

"The Wilson brothers and Harvey then left the doorway, Harvey between them, but not holding or touching them; Lucius was on his left and Charles, this defendant, on his right.

"In this position they proceeded north, turned east on Water street walking quietly towards the police station. Next east of Mann's store a new building was in process of erection and the sidewalk was barricaded, the obstruction extending some little distance beyond the curb line.

"The three men walked out into the street around the barricade and as they approached the eastern corner of it Harvey had each prisoner by the arm; they were still proceeding quietly and not engaged in conversation.

"Just as they were turning in toward the sidewalk this defendant, Charles F. Wilson, exclaimed 'Let her go;' at the same instant he caught Harvey by the coat with his left hand and jerked him around so that while he had been walking east he faced west; with his right hand he drew from his hip pocket a revolver ten or twelve inches long and dealt Harvey a severe blow with the butt of it on the left side of the head which dazed him and caused his knees to bend as if he was about to fall; at that moment Lucius, who had in the meantime freed himself from the grasp of Harvey and running to the west on Water street a distance, fixed by various witnesses anywhere from eight to twenty-five feet, turned and, drawing a revolver similar to the one his brother carried, discharged through the head of Harvey a 45-calibre ball, which entered at the right eye and emerged at the back of the skull. This defendant, when the shot was fired by his brother, stood about four feet from Harvey, with his revolver in hand, evidently awaiting the result of his brother's fire, and ready to complete this assassination of an unarmed peace officer if the first bullet failed to do its work.

"The brothers then fled; Lucius was captured in about thirty minutes after the shooting and this defendant nearly a month later in the city of Buffalo.

"The main question presented is whether, as a matter of law on the facts presented by the People, the conviction of this defendant can stand notwithstanding he did not fire the fatal shot.

"The learned trial judge in his charge to the jury instructed them with great clearness as to the law governing the case, and repeatedly reminded them there were two theories upon which the defendant could be convicted of murder in the first degree, if, in their opinion, the facts justified it; he called to their attention as the first theory that murder in the first degree is the killing of a human being from a deliberate and premeditated design to effect the death of the person killed or of another (Penal Code, § 183, sub. 1), and that a person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids and abets in its commission is a principal (Penal Code, § 29); he also pointed out, as the second theory, that murder in the first degree is the killing of a human being without a design to effect death, by a person engaged in the commission of or in an attempt to commit a felony, either upon or affecting the person killed or otherwise. (Penal Code, § 183, sub. 3.)

"The jury were instructed that the People claimed the evidence justified a finding that there was an understanding between these two brothers, made previously or at the time, to resist to the utmost being arrested even if that resistance led to the taking of human life, and this being so it constituted a deliberate and premeditated design to kill, and death resulting, it was murder in the first degree.

"The jury were also instructed that if they found the two brothers were acting jointly and were aiding and assisting each other in escaping or attempting to escape by force from the lawful custody of the deceased then they need not find a design to effect Harvey's death, and both were guilty of murder in the first degree.

"It was also left to the jury to determine whether, under all the circumstances of this case, the two brothers were in law-

ful custody of Harvey as a peace officer on a charge of felony, and were aiding and assisting each other in an attempt to escape.

"The jury were, throughout the charge, cautioned again and again to keep in mind the legal distinctions to which the court had called their attention. Indeed, the counsel for the defendant urged, upon the argument, that the prisoner was prejudiced by this repeated reference of the trial judge to the legal distinctions in the case.

"We are unable to see any force in this criticism, but on the contrary are persuaded that the jury must have approached the consideration of this case with a very clear apprehension of the principles of law that were to control them in the discharge of their duty.

"A careful study of the facts in this case satisfies us that the jury were justified in rendering a verdict to the effect that this defendant is guilty of murder in the first degree.

"There is abundant evidence to sustain the conclusion that there was a deliberate and premeditated design by these two brothers acting in concert to slay Harvey. It matters not whether that understanding or agreement was formed as part of a general policy adopted by these desperate men while following a life of crime, or an instantaneous compact, born of the exigency of the occasion, when James Harvey had each by the arm and was within one hundred and sixty feet of the police station whose cell doors were about to close upon them. The deliberation and premeditation essential to constitute the crime may have existed in either case.

"The immediate facts surrounding the killing are the only evidence the People could adduce to prove this agreement or understanding, and they were persuasive and convincing to the last degree.

"We have an unarmed peace officer discharging his duty in a gentle and considerate manner, and thrown entirely off his guard by the apparently docile and submissive way in which his prisoners were allowing him to conduct them to the police station; we have two desperate men carrying concealed weapons of an unusually deadly and dangerous character; we have perfect concert of action between the prisoners, both

submissive and quiet until this defendant uttered his warning cry to 'Let her go,' and then each sprang into the most intense activity; this defendant dazed Harvey with a blow from the butt of his revolver, and at almost the same instant of time the bullet of Lucius completed the work of death.

"It is fair to assume from the evidence that within ten or fifteen seconds after this defendant gave his fatal signal James Harvey was lying dead in his tracks with this defendant standing within four feet of him, with his revolver in hand, watching the effect of his brother's shot.

"A more perfect and complete combination and concert of action could not be disclosed by human evidence. The killing of Harvey was the joint act of these two brothers.

"The jury, however, may have adopted the other theory of the case, and reached the conclusion that the two brothers were in the lawful custody of Harvey on a charge of felony, and were aiding and assisting each other in an attempt to escape, which act was also felony, and properly regarded the design to effect Harvey's death as immaterial.

"The facts fully support such a finding by the jury.

"As the verdict was general it is impossible to say which theory of the case the jury selected.

"Having reached the conclusion that the jury were entitled to convict the defendant on either theory of the case it remains for us to consider the exceptions of the defendant.

"Daniel W. Savage, a waiter in the restaurant where the Wilson brothers took breakfast the morning of the murder, was permitted to testify, against the objection of the defendant, that he said in a natural tone of voice to Palmer, the proprietor, when the Wilsons were passing through into the dining room, and between five and seven feet distant from him: 'There goes the burglars.' This was a circumstance to be considered by the jury; it was for them to determine whether the Wilsons heard the remark, and if they believed they did, it was a fact of the very greatest importance bearing both upon the subject of the arrest and of the opportunity afforded the suspected men to make the most deliberate and complete agreement to resist arrest if the police authorities should

attempt it. In this latter aspect this seemingly trifling incident becomes of paramount importance.

"It would make deliberation and premeditation on the part of the Wilson brothers not only possible, but highly probable in the light of the subsequent events already commented upon at length.

"The fact that Savage was permitted to give his opinion under cross-examination that he did not believe the Wilsons heard his remark is entitled to no weight. The cross-examination was thorough and searching as to this incident, and it was for the jury to say if the suspected men overheard the remark.

"The witness Henry P. Haze was allowed to state that the indicted men were brothers.

"The defendant's counsel insists this evidence was calculated to harm the prisoner. We think it was competent and had a direct bearing upon the issue of agreement between the Wilsons to effect their escape by concert of action. This fact by itself would not prove such an agreement, but it is one of many circumstances proper for the jury to consider.

"The defendant's counsel made several requests to charge the jury, which were refused.

"The first reads: 'If the jury find that there was no intent by defendant to kill the officer, and he did not know that Lucius R. Wilson was going to kill him, then, although present and striking Harvey, he cannot be convicted of murder in the first degree.'

"The court refused to charge this proposition as a whole.

"The trial judge pointed out that the statute provided that the intent must be to kill the person who was killed or another, and that if the arrangement was, before the Wilsons met Harvey, to resist to the extent of killing some person to them unknown, he could not charge the proposition as submitted.

"The most obvious vice of this request to charge is that it was general in its character and not limited, as it should have been, to the first subdivision of the statute which deals with the killing of a human being from a deliberate and premeditated design to effect the death of the person killed or of another.

"It would have been error to have charged this proposition under the third subdivision of the statute where there was no design to effect death by a person engaged in the commission of a felony. (Penal Code, § 183, subdivisions 1 and 3.)

"The suggestion that the context of the record reveals that the requests to charge immediately preceding the one under consideration referred to the first subdivision of the statute, and that this one obviously did, is without force, as the criticism is to some extent inaccurate, and furthermore each request must stand by itself.

"The prisoner could not have been prejudiced, as the trial judge had explicitly charged the jury under the first subdivision of the statute, and laid down the law properly.

"We think there was no error in refusing to charge this request.

"The next refused request reads: 'If an agreement existed between the parties to escape from the officer, but not to murder him, then the killing by one is not the act of the other, and unless the jury believe he intended the death of the officer he cannot be convicted of murder in the first degree.'

"This request is general in its character, and does not state the law accurately; to have charged it as it stands would have been error.

"The next three requests refused read: 'There is no evidence that this defendant aided or abetted in the killing of Harvey.'

"'There is no sufficient evidence of a preconceived and common purpose, resolution and agreement to resist Harvey, or any officer, to the extent of killing the officer.'

"'There is no sufficient circumstance proven in this case to warrant the jury in finding any resolution or agreement by defendant with Lucius R. Wilson to commit murder.'

"We think each of these requests was properly refused, as all the questions were for the jury.

"The defendant's counsel refers to a refusal to charge at folio 1679 of the case under his fifth point. The court and counsel seem to have reached an agreement as to the request there considered.

"The last request referred to by defendant's counsel reads:

“‘If the jury have a reasonable doubt as to defendant’s guilt of murder in the first degree, they may convict in a less degree.’

“This was afterwards modified to read ‘second degree’ instead of ‘less degree.’

“The trial judge then defined murder in the second degree, and told the jury substantially they could convict of that degree under the first subdivision of the statute if they had a reasonable doubt as to deliberation and premeditation; he then said to the jury in substance, that under the other subdivision of the statute there was no element of intent involved, and if they found no agreement to act in concert they could not convict the defendant at all, and if they found concert of action it would be murder in the first degree.

“This seems to us the fair intent and meaning of a somewhat discursive charge made in response to this particular request, and we do not think there was a refusal to charge as requested in view of all that was said. The final result was that the jury were correctly instructed as to the law.

“We may state in conclusion that we have not confined our examination of this case to points presented by the prisoner’s counsel, but have considered every possible ground for exception or error contained in the record, and are unable to say that the verdict of the jury should be set aside.

“The judgment of conviction and order appealed from should be affirmed.”

Harrison Hoyt for appellant.

Benj. J. Shove, Dist. Atty., for respondent.

BARTLETT, J., reads for affirmance.

All concur, except ANDREWS, Ch. J., GRAY and O’BRIEN, JJ., who dissent on the grounds: (1) That there was no sufficient evidence to justify the court in submitting to the jury the question whether, on the day of, or on any day preceding the homicide, the defendant and Lucius R. Wilson (who fired the shot which killed Harvey) had entered into a joint agreement, conspiracy or confederacy to resist, to the taking of human

life if necessary, any attempt by any person to arrest or detain them, or hold them in custody, and (2) that the charge of the judge to the effect that if the jury found that such combination or agreement was made, and that the killing of Harvey by the shot fired by Lucius R. Wilson was in execution of such common design, the defendant, Charles F. Wilson, could be convicted of murder in the first degree, was erroneous, for the reason that the evidence furnished no sufficient basis for the charge.

Judgment affirmed. _____

In the Matter of the Judicial Settlement of the Accounts of the Executors of FREDERICK D. HODGMAN, Deceased.

(Submitted March 11, 1895; decided April 9, 1895.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made December 4, 1894, which reversed a decree of the Surrogate's Court of Washington county dismissing a petition to open and vacate a decree of said surrogate and to open defaults of the petitioners.

Edgar Hull for appellant.

Charles S. Foote for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed. _____

LILLIE J. EARLE, Respondent, *v.* GEORGE H. ROBINSON et al.,
Appellants.

(Argued March 11, 1895; decided April 9, 1895.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made February 15, 1895, which affirmed an order of Special Term denying a motion made after supplemental answer to vacate an injunction *pendente lite*.

George M. Pinney, Jr., for appellants.

A. J. Dittenhoefer for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed. _____

THE PEOPLE ex rel. THE NEW YORK AND EASTERN TELEGRAPH
AND TELEPHONE COMPANY, Respondent, v. GEORGE W.
PLYMPTON et al., Commissioners, etc., Appellants.

(Argued March 11, 1895; decided April 9, 1895.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made the second Monday of December, 1894, which affirmed an order of Special Term granting to the relator a peremptory writ of mandamus.

William B. Hornblower for appellants.

E. H. Benn for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed. _____

LOUISA M. GERRY, Respondent, v. WILLIAM H. LIDDLE,
Appellant.

(Argued March 11, 1895; decided April 9, 1895.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made November 20, 1894, which reversed an order made at Circuit denying a motion by plaintiff for a certificate that the title to real estate came in question upon the trial of the above-entitled action, under section 3248 of the Code of Civil Procedure.

Barna Johnson for appellant.

G. W. Youmans for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

FRANCES B. SCOTT, Appellant, v. FRANCES CALLADINE,
Impleaded, etc., Respondent.*

(Argued March 12, 1895; decided April 9, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made June 20, 1894, which affirmed a judgment in favor of defendant entered upon the report of a referee.

August Becker for appellant.

Patrick F. King for respondent.

Agree to affirm on opinion below.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

JANE E. WHEELER, as Administratrix, etc., Respondent, v.
THE WATERTOWN STREET RAILWAY COMPANY, Appellant.

(Argued March 12, 1895; decided April 9, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 24, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict.

D. G. Griffin for appellant.

Charles W. Thompson for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

* Reported below, 79 Hun, 79.

**KETURAH WILLDIGG, as Administratrix, etc., Respondent, v.
THE CITY OF BROOKLYN, Impleaded, etc., Appellant.**

(Argued March 12, 1895; decided April 9, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 27, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict and also affirmed an order denying a motion for a new trial.

E. B. Barnum for appellant.

Arthur H. Smith for respondent.

Agree to affirm on opinion below.

All concur except PECKHAM, J., not voting.

Judgment affirmed.

**ANNIE DUKE, an Infant, by Guardian, etc., Appellant, v.
THE TENTH AND TWENTY-THIRD STREET FERRY COMPANY,
Respondent.**

(Argued March 14, 1895; decided April 9, 1895.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made June 25, 1894, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Circuit dismissing the complaint.

A. H. Dailey for appellant.

William A. Jenner for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

CATHARINE T. SMITH et al., as Executors, etc., Appellants and Respondents, *v.* **THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK**, Appellant and Respondent.

(Argued March 14, 1895; decided April 9, 1895.)

CROSS-APPEALS from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 14, 1894, which affirmed a judgment in favor of plaintiffs entered upon a verdict.

John H. Kavanagh for plaintiffs.

George L. Sterling for defendant.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

RICHARD P. MCBRIDE, Respondent, *v.* **FRANK O. CHAMBERLAIN et al.**, as Administrators, etc., Appellants.

(Argued March 18, 1895; decided April 9, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 3, 1893, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

John Gillette for appellants.

Henry M. Field for respondent.

Agree to affirm ; no opinion.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed. _____

MARK LYTGOE, Appellant, *v.* **MARTHA LYTGOE et al.**, Appellants, et al., Respondents.

(Argued March 19, 1895; decided April 9, 1895.)

APPEAL from so much of judgment of the General Term of the Supreme Court in the first judicial department, entered

upon an order made January 12, 1894, as affirmed an interlocutory judgment awarding dower to the defendant **Maria Linden**, entered upon an order of Special Term confirming the report of a referee.

A. J. Skinner and *L. A. Gould* for appellant.

Edward S. Peck for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed. _____

ALLIE HARMON, by Guardian ad Litem, Respondent, *v.* **THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY**, Appellant.

(Argued March 20, 1895; decided April 9, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made June 20, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

J. W. Dunwell for appellant.

W. E. Hughtitt for respondent.

Agree to affirm; no opinion.

All concur, except **FINCH** and **HAIGHT, JJ.**, not sitting.

Judgment affirmed. _____

L. D. HARMON, as Administrator, etc., Respondent, *v.* **THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY**, Appellant.

(Argued March 20, 1895; decided April 9, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 13, 1895, which affirmed a judgment

in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

J. W. Dumbell for appellant.

W. E. Hughitt for respondent.

Agree to affirm ; no opinion.

All concur, except FINCH and HAIGHT, JJ., not sitting.

Judgment affirmed.

MINNA KNOCH, Appellant, *v.* **MARIE E. H. VON BERNUTH**, as Executrix, etc., Respondent.

It seems, that one who as a witness has testified to a state of facts in favor of the successful party to an action is not thereby estopped from asserting the contrary in a subsequent action in his own behalf against the party in whose favor he testified or his legal representatives.

A judgment will not be reversed because the trial court has drawn from facts properly in the case for other purposes an erroneous legal conclusion as to a question not necessarily involved in the case or essential to its determination.

(Argued March 20, 1895; decided April 9, 1895.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made April 2, 1894, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term dismissing the complaint.

The following is the opinion in full :

"The plaintiff, as assignee of John Boker, her former husband, brought this action against the defendant, as the personal representative of Louis Funke, to compel an accounting and payment to her of certain interests or profits in a business that, as she claims, passed to her under the assignment from her husband. She has been defeated in the action on various grounds : (1) That her husband had no interest in the business or profits to assign, and nothing passed to her under the assignment. (2) That the assignment was collateral security merely for the payment of a certain note which had been fully paid. (3) That she is estopped through the acts of her husband and assignor in certain prior litigations

from now claiming any interest in the proceeds of the business. (4) That the claim is barred by the Statute of Limitations.

"The action was commenced in June, 1889, and the following facts were conceded or established and found by the trial court: John G. Boker, the father of plaintiff's assignor, had acquired the recipe, formula and secret for the manufacture of a cordial known as 'Boker's Stomach Bitters,' with the labels designating the same, and the trade mark and sole right to manufacture and sell the same. On the 20th of February, 1860, he assigned and transferred the same by an instrument in writing to his son-in-law, defendant's testator, who continued, up to the time of his death, on April 2, 1892, to be the sole proprietor of the right thus assigned and the business of manufacturing and selling the article. In consideration of this assignment the assignee agreed to carry on the business and to pay over to Marie Boker, the wife of the assignor, during her life, two-thirds of the net profits arising therefrom. John G. Boker died a few days after this assignment, on March 3, 1860, but his widow, for whose benefit the transfer was made, survived him for many years and until July 5, 1888, when she died, having resided for most of the time in Germany after her husband's death.

"It has been found by the trial court and is not disputed that the assignee, the defendant's testator, faithfully performed his agreement to pay to the widow during her life two-thirds of the net profits of the business. He rendered to her every year statements of the business and its profits and paid to her, or upon her order, the share of the profits secured to her by the assignment and agreement. Her share of the profits amounted to a very considerable sum annually, and from time to time she gave directions that a part of it should be credited and paid to other members of her family, and in all cases her directions were complied with. Among others, she directed that a portion of her share be credited to a former wife of her son, John Boker, in trust for his benefit, and paid to her for his use. This request was carried out by the defendant, and certain sums were credited and paid to John's wife as trustee for him. It is claimed that John did not in fact secure the

benefits of these credits or payments, but that they were retained or otherwise disposed of by his former wife, and the principal feature of this action is to compel Funcke, the son-in-law, assignee and proprietor of the business, to account for the same. He died after the commencement of the action, which has been continued against his executrix. This is the interest which the plaintiff claims under her assignment.

“Without reference to the other grounds upon which the plaintiff was defeated in the action, it is quite sufficient to say that the defendant's legal relations and obligations were with Marie Boker, the widow of his assignor. He, having accounted to her for two-thirds of the profits of the business and paid over the same to her, or to others by her directions, is relieved from any liability to account to the plaintiff. He has discharged all his obligations, and if any portion of the share which he disposed of under the directions of Marie failed to reach the objects of her bounty, he is not in anywise responsible for the diversion. It is said that Marie, in directing certain sums to be paid to the former wife of her son, in trust for him, created a valid trust which may be enforced in equity. That may be so, but the defendant was not the trustee, and after he had paid the money over according to the directions of the creditor to whom it belonged, he had no further duty to perform and incurred no further obligations concerning it. If there was any trust, then the former wife of John was the trustee, and if she failed to account or use the money for his benefit, her default cannot be charged to the defendant. The findings in the trial court, which are fully sustained by the evidence, leave no ground upon the merits for the plaintiff's case to rest. Without discussing any question as to the Statute of Limitations, the other finding that the note to which her assignment was collateral has been fully paid is supported by evidence. We must, therefore, assume it to be a fact in the case, and this assumption would deprive the plaintiff's claim of any equitable basis.

“There are several exceptions in the case, only two of which require any special notice. The ground upon which the plaintiff's assignee, John Boker, claimed an interest in the profits is stated in the complaint in a very general way. The

statements were very broad and not confined to the interest paid over for his benefit in trust. In 1879 the defendant, as assignee and proprietor of the right secured by the recipe, formula and trade mark, brought an action in the courts of Louisiana against parties there for an infringement of his right, to restrain the use of the trade mark and labels and for damages. He succeeded in the action. In the course of the proceedings John was examined as a witness for the plaintiff and his depositions taken in this state. He testified that he had no interest whatever in the right or in the business. On the trial of the present action these depositions were offered in evidence for the defense and received under objection and exception. They were properly received, since they were at least admissions on the part of the witness that he then had no interest in the formula, trade mark or business, and thus tended to disprove the broad allegations of the complaint.

"Subsequently the judgment record in the action in which the depositions were taken was offered and received under a general objection. The record containing the pleadings in the case showed what the issues were to which the testimony in the depositions related, and thus tended to give point and application to the statements of the witness.

"While this document was not very material, it was not error prejudicial to the plaintiff to receive it, especially against an objection so general as the one interposed.

"The learned trial judge found the fact of the institution of the action in Louisiana by the defendant, its purpose, object and result, and further that John, the plaintiff's assignor, gave testimony to the effect that the defendant was the sole owner of the recipe, formula and right to manufacture.

"On this finding a conclusion of law was based to the effect that John by thus giving testimony in the action estopped himself and all claiming through or under him from claiming, as against the present defendant, who was the plaintiff in that suit, any interest in the business or the profits resulting from the sale of the bitters. We do not mean to affirm the correctness of this proposition. It would probably be quite difficult to show that a witness who testified to a state of facts in favor of the successful party to an action is thereby estopped

and forever precluded from asserting the contrary in a subsequent action in his own behalf against the party in whose favor the testimony was given or his legal representatives. His testimony once given bears upon the truth or good faith of any subsequent contradictory statement, but does not necessarily of itself create an estoppel. This finding, however, is not material. It constitutes an independent ground of defense in the decision below, and has no necessary connection with the other matters of defense which appear in separate findings and are so free from doubt or conflict as to determine the result, irrespective of any other questions. If the findings in regard to the former suit and the estoppel are stricken out, the judgment is well sustained by what remains. A judgment ought not to be reversed because the trial court has drawn from facts properly in the case for other purposes, an erroneous legal conclusion as to a question not necessarily involved in the case or essential to its determination. Upon the other facts found by the learned trial judge, the plaintiff's case necessarily failed, and an additional reason for the result, though erroneous, does not furnish any ground for complaint by the plaintiff. There are some other questions presented on the briefs of counsel, but it is not necessary to consider them since the findings and other features already considered are controlling and dispose of the appeal.

"The judgment should be affirmed, with costs."

Charles Goldzier for appellant.

Austin Abbott for respondent.

O'BRIEN, J., reads for affirmance.

All concur, except GRAY, J., not voting.

Judgment affirmed.

JOHN S. THOLEN, as Guardian ad Litem, Respondent, v. THE
BROOKLYN CITY RAILROAD COMPANY, Appellant.

(Argued March 20, 1895; decided April 9, 1895.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made November

26, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Albert C. Tennant for appellant.

Thomas E. Pearsall for respondent.

Agree to affirm ; no opinion.

All concur, except GRAY, J., not sitting.

Judgment affirmed.

In the Matter of the Judicial Settlement of the Account of
CHARLES T. HARBECK et al., as Executors, etc.

(Argued March 21, 1895; decided April 9, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 12, 1894, which affirmed a decree of the surrogate of the city and county of New York upon judicial settlement of the accounts of the petitioners, as executors and trustees under the will of Ella Flagg, deceased.

J. Tredwell Richards for appellants.

Samuel S. Thomas for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

ANTHONY TIMONY, as Administrator, etc., Respondent, v. THE
BROOKLYN CITY AND NEWTOWN RAILROAD COMPANY,
Appellant.

(Argued March 21, 1895; decided April 9, 1895.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made November 26, 1894, which affirmed a judgment in favor of plaintiff

entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Albert C. Tennant for appellant.

Charles J. Patterson for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

STEPHEN SMITH et al., as Executors, etc., Appellants, v. THE
TOWN OF GREENWICH, Respondent.*

145 649
146 654

(Argued March 22, 1895; decided April 9, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made July 14, 1894, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term overruling plaintiff's demurrer to the answer and dismissing the complaint.

The following is the opinion in full :

"The plaintiffs served an ambiguous complaint. That is the way in which they encountered defeat and the cause of their principal trouble. Their argument here goes upon a denial of that ambiguity, after having admitted it upon the trial, and having refused to remove it when it was explicitly pointed out. The complaint was so drawn as to admit of a construction that the action was to recover interest due and payable upon the sealed bonds of the town of Greenwich issued in aid of a railroad construction. But, regarded as specialties, the instruments were exposed to certain possible objections. The complaint shows that six thousand and five hundred dollars of the bonds were issued before May 12th, 1871, and, therefore, although the commissioners were duly and lawfully appointed, were authorized to borrow the money and to bind the town to its re-payment, they were, nevertheless, specifically limited to the issue of bonds payable in thirty

* Reported below, 80 Hun, 118.

years, and they made the mistake of executing them maturing in twenty years. The balance of thirty-three thousand and five hundred dollars were issued after May 12th, 1871, and when, by an amended act, it was lawful to make the securities payable within any period less than thirty years. But that amendment of the law which made the twenty years' credit permissible imposed another condition which was that the commissioners should not issue the bonds so as to make more than ten per cent of the whole loan fall due in any one year. The question of the liability of the town had three times been before this court anterior to the commencement of this action and the preparation of the complaint therein. (*Potter v. Town of Greenwich*, 92 N. Y. 662; *Brownell v. Town of Greenwich*, 114 id. 518; *Hoag v. Town of Greenwich*, 133 id. 152.) In the last case it was conceded for the purposes of the argument, but without either discussing or deciding the point, that the twenty-year bonds, issued when the law required a credit of thirty years, were for that reason void as securities; but, it was held that, disregarding them, the town was still liable upon an implied contract to pay principal and interest of the money loaned. That was the legal situation when the present complaint was drawn. The pleader observed that if for any reason the power to issue bonds, concededly existing, was imperfectly or unlawfully executed, there still would remain a right of action founded upon the authorized and completed loan, and resting upon an implied contract of re-payment. Observing that fact he drew his complaint with a double aspect. He sets out the bonds and the precedent facts necessary to make them authorized; but beyond that he carefully pleads the loan of the money to the town in good faith, its receipt and use of the money for the permitted purposes and the failure to pay after demand. All the elements of an action on an implied contract, irrespective of the sealed bonds, were fully and carefully supplied, and they entered into and formed part of what was pleaded as one single and complete cause of action. When the defendant answered, it had to face this ambiguity, and come prepared for either attitude which might be assumed. Regarding the complaint as a suit on the bonds, it alleged defenses aimed at a destruction of

their validity. Regarded as an action on an implied contract to recover interest payable on the money loaned, the defense of the six-year and the ten-year Statute of Limitations was interposed. To those defenses the plaintiffs demurred. The defendant's brief asserts, and the facts were not denied or questioned on the argument, that at the first trial the defendant's attorney, in open court, offered to stipulate that he would strike out the defenses demurred to, if plaintiffs' attorney would stipulate to recover only on the bonds as valid contracts under seal, or on a cause of action to which the six or ten years' statutes would not be a defense, and the court said openly that an order would be granted sustaining the demurrer if such stipulation should be made. The ambiguity of the complaint, its double aspect, thus came very plainly to the surface. The plaintiffs were charged with it, were asked to remove it, were offered immunity from the pleas of the statute if the ambiguity should be ended, but they steadily and persistently refused. The demurrers were overruled, and thereupon judgment was rendered for the defendant dismissing the complaint. Why that was done the record before us does not show, and it is not material to inquire, since no question is raised here, except over the sufficiency of the pleas and the overruling of the demurrers.

"It is at this point it seems to me that the learned counsel for the plaintiffs makes his mistake. He says that as to the sixty-seven bonds issued after May 12th, 1871, there has never been in this court any adjudication of their invalidity and we have always treated them as valid. That is entirely true and the General Term is mistaken in saying that we have ever held them to be void. But what then? The reply of the learned counsel is that he should have recovered upon them as specialties. I think so too, so far as the facts have come to our knowledge, though we do not so decide; but whose fault is it that there was no such recovery, and how is any such question before us? When the demurrers were overruled the trial must have proceeded in some manner upon the issues joined. The plaintiffs were at liberty to prove their bonds, the defendant at liberty to establish their invalidity, quite possibly even by some new proof of which we had never

heard and upon which we had never passed. What took place we do not know. The record before us discloses nothing but a judgment for the defendant on the merits. It may have been very wrong, but how can we inquire into it? By what process can we say that the court erred in rendering it when we know nothing of what was proved or admitted on the trial? The only alleged error brought to our notice is the ruling on the demurrer. Beyond that we are necessarily ignorant of what occurred. Something may have been proved or admitted in open court which justified the judgment rendered and showed the bonds to be invalid outside of any previous ruling of ours. The decision on the demurrer is before us. The material on which to consider it is presented, but the judgment for the defendant on the merits is brought here, bare and lonesome, and without anything showing it to have been erroneous. It is not necessarily wrong: it may have been entirely right, and no question about it is here for our review. The inevitable inference from what we do know is that plaintiffs regarded the pleas of the Statute of Limitations as fatal, if those pleas stood, and perilled the entire result on the decision of the demurrers. Why they did so we are not required to explain or even to understand.

"The learned counsel says also that this court did not decide in the *Hoag* case that the bonds issued before May 12th, 1871, were void. That also is true. We assumed their invalidity for the sake of the argument because, conceding so much, we thought there could still be a recovery and put the decision upon the ground of an implied contract. We did so for the reason that we had grave doubts of the validity of those bonds considered as securities, and have such doubts still. The question differs from that decided in *City of Quincy v. Warfield* (25 Ill. 317). There the bonds bore twelve per cent interest when the statute only permitted eight, and the court held the bonds good *pro tanto*. An illegal excess was to be cut off. But here something not in the bonds was to be added, viz., an additional credit of ten years. But, again, that question is not before us, and we are not required to consider or discuss it. The same thing also is true of the further contentions that a suit on the coupons is a

suit on the bonds because they partake of the nature of the specialty, and that the bonds themselves in spite of the error they contained were good for all purposes except the term of credit. For there are in the record no findings either of fact or law and no request for either, no objections of any kind and not a single exception; in other words, nothing upon which error could be predicated. Nevertheless the question of the demurrer and the validity of the pleas may be regarded as submitted to us by the common consent of both of the litigating parties.

"There is thus only the one question presented, whether the court should have stricken out the pleas of the Statute of Limitations. They were a good and complete and perfect defense to the cause of action pleaded which rested on an implied contract. If plaintiffs, nevertheless, could under the same pleadings and in spite of the pleas have recovered on the bonds as specialties they should at least have tried to do so, should have presented their proofs and arguments, asked rulings and taken exceptions, instead of apparently consenting to a final judgment against themselves on the merits simply because their demurrer was overruled. The ambiguity of the complaint was not the defendant's fault. It had the right to plead all the defenses it had in either aspect of that complaint, and when it offered to withdraw those pleas if the plaintiffs would stand solely upon their bonds the latter have only themselves to blame for the refusal.

"The record discloses no error and the judgment should be affirmed, with costs."

Brainard Tolles for appellants.

Charles C. Van Kirk for respondent.

FINCH, J., reads for affirmance.

All concur.

Judgment affirmed.

STEPHEN SMITH et al., as Executors, etc., Appellants, v. THE
TOWN OF GREENWICH, Respondent.

THIS case presented the same question, and was argued and decided with *Smith v. Town of Greenwich (supra)*.

NICHOLAS POWERS, as Administrator, etc., Respondent, v. THE
PRUDENTIAL INSURANCE COMPANY OF AMERICA, Appellant.

(Argued March 21, 1895; decided April 16, 1895.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 13, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

Thomas F. Magner for appellant.

Charles J. Patterson for respondent.

Agree to affirm; no opinion.

All concur, except GRAY, J., not voting.

Judgment affirmed.

JOHN DURYEA, Appellant, v. CATHERINE FUECHSEL et al., as
Executors, etc., Respondents.*

(Argued April 8, 1895; decided April 16, 1895.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 16, 1894, which reversed an order of Special Term amending a judgment in favor of defendants and vacated a judgment based upon the order reversed.

The following is the opinion in full:

* Reported below, 76 Hun, 404.

"This is an appeal from an order in this action, and the record discloses a condition of things so complicated and anomalous as to render an examination of the case, and any attempt to unravel the web in which the parties are involved, quite difficult. The case illustrates how a very plain and simple issue may be obscured and the rights of the parties lost sight of by errors or mistakes in the procedure. In an ordinary action for the recovery of the price of goods sold, the parties have become involved in a hopeless tangle of judgments, orders and appeals, without having yet, in any legal sense, touched the original question in dispute. We do not propose to consider these proceedings in their technical character since we have arrived at the conclusion that the case ought in some way to be brought back to the point from which the parties and their counsel have wandered in controversies arising from the peculiar and mistaken methods of procedure that have been followed. The action was commenced by the plaintiff in February, 1889, against George E. Fuechsel, the defendant's testator, who died subsequent to the joining of issue in the action. The complaint states a cause of action for the recovery of the price of certain carloads of cauliflower, and the price is stated at a gross sum, besides a certain portion of the profits made or to be made by the defendant upon the preparation and sale of the goods. The defense was substantially a general denial, a breach by the plaintiff of the agreement between the parties and a counterclaim.

"In March, 1890, the issues in the action appear to have been regularly tried by the court, and, upon findings of fact and law then made, the complaint was dismissed. There were two conclusions of law stated in the decision: (1) That the plaintiff has established no cause of action against the defendant, and (2) that the defendant is entitled to judgment dismissing the complaint, with costs. On this decision judgment was entered on the first Monday of March, 1890, adjudging that the complaint be dismissed upon the merits, and that the defendant recover of the plaintiff the sum of \$220 costs. So far the proceedings are quite intelligible. But it is claimed by the counsel for the plaintiff on his brief

here, that in some way, the parties were transposed in the decision, and that the court, in fact, did not intend to dismiss the plaintiff's complaint, but the defendants' counterclaim. There is nothing in the record before us to show this, except possibly, the order which was subsequently made. This order appears to have been granted more than a year afterwards, on April 10, 1891, upon the plaintiff's application, and, after reciting the trial of the action, the dismissal of the complaint, the entry of judgment for the defendant, the denial of a motion by plaintiff for a new trial on the ground of irregularity and surprise with leave to apply for leave to amend the judgment, the order then directs that the judgment, entered about a year before in favor of the defendant, be amended by adding the following provisions at the foot of it: (1) That a referee who was named be appointed to take and state an account between the plaintiff and defendant concerning the matters alleged in the complaint and stated in certain of the findings of fact mentioned; (2) that the referee report thereon to the court with the testimony taken; (3) that the first and second conclusions of law in the decision referred to be stricken out; (4) that the clerk correct the judgment record and docket of the judgment in the case accordingly. We cannot know what reasons moved the court to make this order since the papers upon which it was granted do not appear in the record. It may be that it was intended to authorize a vacation of the judgment entered for the defendant. The court had the power, if it appeared that it had been entered by some mistake, irregularity or error which deprived it of the character of the judgment of the court, as intended by the trial judge, to vacate it, or to set it aside for any error of law or fact committed at the trial, so far as power is given to the trial court for that purpose by the Code. But it appears that the judgment for the defendant dismissing the complaint and for costs was never in fact vacated, and it still remains upon record as the final disposition of the issues in the case.

“But the parties appeared before the referee named in the order, from time to time, and proof was given before him at length touching the merits of the case. The referee reported

to the court in obedience to the order, and on the 13th of November, 1893, the court confirmed it, overruling the defendants' exceptions to the same, and directing the clerk to enter judgment for the plaintiff for over \$5,000.

"In this way a judgment for the defendants dismissing the complaint has been changed to a judgment for the other side. The defendants appealed to the General Term from the judgment, and also from the order which appointed the referee and amended the original judgment already referred to. That court reversed the order and vacated the judgment in favor of the plaintiff by an order entered March 16, 1894.

"It appears from the opinion of the court that the reversal proceeded upon the ground that the court at Special Term had no power to amend the judgment in the particulars stated. The amendment of the judgment in the manner stated and the appointment of a referee to take proofs and report, notwithstanding the existence of a judgment in favor of the defendants dismissing the complaint, was not, we think, a matter resting in discretion, but a question of power. The appointment of the referee, being without jurisdiction, all the proceedings based upon the order, including the judgment for the plaintiff, depended upon it and fell with it. It is the decision of the General Term in making this order of reversal that is sought to be reviewed by this appeal. We think that the order was properly reversed and the judgment following it properly vacated. There are some further complications presented by a motion to dismiss an appeal from another judgment, which motion has been submitted with this appeal.

"It appears that, what is called a judgment, was also entered upon that part of the order of the General Term which vacated the judgment for the plaintiff on the report of the referee. Who entered this so-called judgment, or what it adjudges, does not appear, as it is not in the record or described in the motion papers. It does appear, however, that after it was entered, and in May, 1894, the plaintiff appealed from it to this court, just as if the court below had reversed instead of vacating the judgment upon the report of the referee. Of course there was no basis for any judgment and no authority to review the

General Term in that way. In November, 1894, after the appeal to this court, the General Term vacated the so-called judgment from which the appeal was taken, and this leaves the plaintiff with an appeal in this court from a judgment which has been vacated, since the appeal, by the court in which it was rendered. It is plain that the defendants are entitled to have it dismissed. It appears, also, that another appeal in behalf of the plaintiff has been taken to the General Term from the judgment in favor of the defendants dismissing the complaint, which was entered on the first Monday of March, 1890, already mentioned. A motion to dismiss it has been made by the defendants and denied. There seems to be some question in regard to the right of the plaintiff to have the appeal heard, but just what it is, does not appear. It is quite possible that the plaintiff may have a meritorious cause of action which is in danger of being lost in the contention over questions of practice. The action of the trial court in appointing the referee, the report of the referee and the order confirming the report and directing judgment in his favor would seem to give considerable moral support, at least, to that view. He ought to have an opportunity to present his case to the court and to procure a judicial determination of the issues involved. If the judgment first entered dismissing the complaint is in fact such a determination and not the result of mistake, irregularity, or error, within the power of the trial court to correct, then his only remedy is to pursue his appeal from it. Whatever reasons were made to appear to the court, or in fact existed, for the appointment of the referee, would seem to be of at least, equal weight upon a motion to vacate, correct or set aside the judgment, and if, as it now stands, it does not represent the actual decision upon all the issues, it should be set aside or vacated. The court has large powers over its own judgments, and, we think, that fairness to all concerned demands that this case should be remitted to the Special Term for the exercise of its discretion in that regard as the facts appearing may require.

“The order appealed from should be affirmed, without costs to either party, but with leave to the plaintiff to move at Special Term to vacate or set aside the judgment of March,

1890, or to renew his motion for a new trial, and the motion to dismiss the appeal pending in this court from the subsequent judgment should be granted, without costs."

Alfred A. Gardner for appellant.

Flamen. B. Candler for respondents.

O'BRIEN, J., reads for affirmance.

All concur.

Ordered accordingly.

ISABELLA M. BAIRD, as Executrix, etc., Appellant, v. WILLIAM BAIRD, Impleaded, etc., Respondent.

ISABELLA M. BAIRD, as Executrix, etc., Appellant, v. JAMES C. BAIRD, Impleaded, etc., Respondent.*

145 659

147 466

148 414

145 659

160 488

145 659

161 425

In actions by plaintiff as executrix of B. to foreclose two mortgages these facts appeared: B. in his lifetime was the owner of three farms, all of which had been paid for and improved with the aid of the services of his two sons, who had worked for him after their majority. On a settlement between the parties it was agreed that B. was indebted to his sons in the sum of \$5,000, and in consideration thereof he deeded to each of them an undivided one-half of one of the farms. The evidence tended to show and the trial court found that the intention was to vest in the sons the title in the farm, but the father, fearing that the farm might be lost by the sons in speculation, to prevent this, required each of his sons to give to him a mortgage for \$1,500 on the farm, which were the mortgages in suit; no bond was given, no actual debt was intended to be secured, and the mortgages were not recorded in B.'s lifetime. *Held*, that there was no consideration for the mortgages; and so, that the actions were not maintainable.

Reported below, 81 Hun, 800.

145 659

172 802

172 808

145 659

173 6

(Argued March 22, 1895; decided April 16, 1895.)

APPEALS from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon orders made October 2, 1894, which affirmed judgments in favor of defendants entered upon decisions of the special

*This case is put in the Memoranda for the reason that a majority of the court did not concur in the opinion, but simply in the result.

county judge of Monroe county on trial at Special Term, dismissing the complaint in each action.

The following is the opinion in full :

"Prior to the year 1873, John Baird, the plaintiff's husband and testator, was the owner of the farm which is covered by the two mortgages sought to be foreclosed in these actions. In that year, his two sons, William and James, defendants, went into possession of it, and the father directed the assessors to transfer the assessment on the farm to his sons. They have remained in possession ever since. In October, 1874, the father deeded the farm to the sons, who took title under these deeds as tenants in common. It appeared that the father had two other farms, all of which had been paid for and improved with the aid of the labor and services of his sons, who had worked for him after their majority. On a settlement between the father and the two sons, it was agreed that he was indebted to them in the sum of \$5,000, and that was the consideration for the conveyance. A deed was given to each son conveying an undivided half of the farm in consideration of \$2,500. The evidence tended to show, and the trial court has found, that the intention was to vest the title in the sons in fee; but it appears that the father had some fears that his sons would not be able to take care of the property thus conveyed and that it might be lost in speculation or otherwise. In order to prevent such a result, as he said, he required the sons to give back to him mortgages for \$1,500 each on the farm. No bond was given and no actual debt was intended to be secured, and they were not recorded by the father in his lifetime. With respect to the purpose and consideration of these mortgages the testimony tended to show, and the trial court found, that they were not intended to secure any debt or to be or become a valid subsisting security, or to be recorded or enforced, and were, in fact, without any consideration whatever. In the year 1875 the wife of John Baird, and mother of the defendants, died, and, the year following, he married the plaintiff. He died in 1883, leaving a will, in which the plaintiff was named as executrix. In that capacity she brought actions against each of the sons to foreclose the mortgages given by them respectively. The complaint was

dismissed in each case and the judgments were affirmed at General Term. There are two appeals and two records, but both judgments rest on precisely the same facts, and the questions involved in both appeals are identical. Both cases may, therefore, be conveniently considered and disposed of as one.

"The plaintiff's right to enforce the mortgage is the same and no other than the mortgagee, her husband and testator, had in his lifetime. She stands in the place of her husband and cannot enforce the instrument unless he could, and every defense that the defendants could urge against the mortgage during the life of the father, they may interpose now against his personal representative. The instruments purport to have been given to secure the payment of money, but it was shown at the trial affirmatively, and found by the trial court, that no debt in fact existed in favor of the father against either of the sons; that there was no intention to give the mortgage on the one hand, or to hold it on the other, as security for any debt. That in fact there was no legal or equitable consideration moving between the parties and no intention on either side to treat the instruments as binding obligations or as valid or subsisting securities. The evidence upon which these findings were made, if competent, was sufficient and the fact is not open to question or review here.

"The findings are based upon the business relations which the parties occupied to each other before the father gave up the possession of the farm to the sons and then conveyed it to them, taking back the mortgages in question, and upon his subsequent conduct and declarations as to the character of the instruments and the purpose of their execution and delivery. The general principle that an instrument under seal, in the form of a mortgage upon real estate, which upon its face expresses a consideration and purports to have been given as security for a debt may, nevertheless, as between the parties, be shown to have been purely voluntary or without any consideration, and so invalid, is not denied. (*Davis v. Bechstein*, 69 N. Y. 440; *Hill v. Hoole*, 116 id. 299; *Briggs v. Langford*, 107 id. 680; *Thomas on Mort.* § 847; *Jones on Mort.* § 1297.)

"The point upon which the learned counsel for the plaintiff

relies is that evidence was not admissible at the trial to wholly contradict and defeat the instruments by showing, contrary to what appeared on their face, that they were intended to have no operation whatever. It is sought to distinguish this case from that of a deed, absolute upon its face, which may be shown to be in fact a mortgage, and from the numerous other cases in which equity permits a party to show that an instrument, appearing upon its face to be of one character, is or ought to be in truth of quite another character. It is said that the principle upon which these cases rest gives no sanction to what was held by the court below in this case, that a party may impeach his deed by showing, not only that it was without consideration, but that it was intended to have no validity or become of any binding force whatever.

“The desire on the part of the father to retain some sort of guardianship over the title to the farm which he had conveyed to the defendants was, perhaps, natural enough under the circumstances, and it is frequently shown in such transactions. That the mortgages were not intended to be held by him for any other purpose is supported by the circumstances that no bond was given; that they were not recorded, and no claim was made by the mortgagee during his life, a period of about nine years that they were in his hands for any other purpose or for the payment of either principal or interest though past due. All the circumstances, when considered with the proof of the statements and declarations of the father, were sufficient to warrant the findings of the trial court with respect to the real purpose with which the instruments were made and their true consideration. (*Holmes v. Roper*, 141 N. Y. 67; *Lyon v. Ricker*, Id. 225.)

“The presumption of some consideration that arose from the presence of a seal was overthrown, and we must assume that the instruments were without consideration of any kind. (*Gray v. Barton*, 55 N. Y. 68; *Best v. Thiel*, 79 id. 15; *Torry v. Black*, 58 id. 185; *Home Ins. Co. v. Watson*, 59 id. 395; *Dubois v. Hermance*, 56 id. 673.)

“There is no reason that we can perceive for giving to these instruments any greater force or effect than was contemplated by the parties when they were executed and delivered. There

is no estoppel or any right which attached in favor of third parties, and we are not aware of any principle which would now require a court of equity to treat these instruments as valid subsisting obligations unless they were intended as such when made, and this is negatived by the findings.

"Nor do we perceive any good reason why the real purpose and true consideration and object of the mortgages should not be made to appear when the aid of a court of equity is invoked for their enforcement. The authority relied upon by the learned counsel for the plaintiff in support of his contention is a remark of Judge RAPALLO in the case of *Hutchins v. Hutchins* (98 N. Y. 56), in which it is said: 'It has never been held that a deed can be so far contradicted by parol as to show that it was not intended to operate at all, or that it was the intention or agreement of the parties that the grantee should acquire no right whatever under it, or that he should reconvey to the grantor on his request without any consideration.'

"That remark must be understood with reference to the facts of the case then under consideration, which was the case of a deed absolute in form but intended as a mortgage. The defendant's answer was, however, so drawn as to leave room for the construction that he intended to urge that the conveyance was intended to be wholly inoperative, or in trust, or to secure a debt which the parties had agreed should never be paid, and it was with reference to this feature of the case that the expression was used. It was applicable to the case then under review, but cannot be regarded as authority for the proposition that the defendants in this case are precluded from showing that the mortgages were without any consideration in fact, or that they were not intended by any of the parties to have the effect of incumbering or defeating the title which the father had just conveyed to his sons. The rule which excludes evidence of parol negotiations or conditions, when offered to contradict or substantially vary the legal import of a written agreement, does not prevent a party to the agreement, in an action between the parties, from showing, by way of defense, the existence of a contemporaneous oral agreement, made at the time the writing was executed

and delivered, which would render the use of the written instrument, for any purpose contrary to or inconsistent with the oral stipulation, dishonest or fraudulent. (*Juilliard v. Chaffee*, 92 N. Y. 529.) The consideration of a written instrument is always open to inquiry, and a party may show that the design and object of the agreement was different from what the language, if alone considered, would indicate. (*Id.*) Parol evidence may also be given to show that a writing, purporting to be a contract or obligation, was not in fact intended or delivered as such by the parties. (*Grierson v. Mason*, 60 N. Y. 394.) So, a conveyance absolute in form may be shown, as against the heir at law of the grantee, to have been made in trust for the benefit of a partnership firm, of which the grantee was a member, and so held by him in trust for the firm. (*Bank v. Grote*, 110 N. Y. 12.) Of course there may be cases where the rights of innocent third parties intervene to modify or change the rules, as in the case of negotiable instruments, or where there exists some element of estoppel, but as between the parties to the instrument there is no reason why the truth, with respect to the real object and consideration of the instrument, may not be made to appear. The plaintiff was not entitled to maintain the actions for the foreclosure of the mortgages unless it was found that there was some debt due to her for the payment of which they were the security. The findings are that no debt ever existed, and this is conclusive against the plaintiff's right of action. In an action to enforce a mortgage by sale of the land the amount; if anything, of the lien is an issue which the parties certainly have the right to contest. It is the debt which gives the mortgage vitality as a charge upon the land, and generally where there is no debt or obligation there is no subsisting mortgage. The instruments contain a consideration clause and a seal, and much of what has been said by courts and writers to the effect that a party cannot be permitted to defeat his own deed by parol proof is based upon the importance which was attached to the presence of these conditions in an instrument by the common law. The conception that some consideration was necessary to support every promise and covenant was borrowed from the civil law, but

the consideration was formerly deemed to be conclusively established by the presence of the consideration clause or the seal. It was originally supposed that the recitals and clauses of a contract expressing a consideration could not be varied by parol proof to the contrary, but that rule was gradually abandoned and now that clause is open to parol proof. (*McCrea v. Purmot*, 16 Wend. 460; *Hebbard v. Haughian*, 70 N. Y. 54; *Ham v. Van Orden*, 84 id. 269.) So, also, the conclusive presumption of a consideration which formerly arose from the presence of a seal was modified by statute, and it is now open to the maker of such an instrument to allege and prove the absence of any consideration in fact as a defense. (3 R. S. [5th ed.] 691, §§ 77, 78; Code, § 840.)

"There are, it is true, expressions to be found in some cases to the effect that while the question of consideration is open to be varied by parol proof, yet the party cannot be permitted to claim that a deed or other instrument with a consideration clause or a seal, or both, is wholly without consideration, and thus entirely defeat it. If this idea is anything more than a somewhat shadowy and fanciful remnant of the ancient law, it is not easy to define its precise scope or practical application when applied to an executory instrument like a mortgage. To say that in a case like this it is open to the defendant to reduce by parol proof the sum expressed as the consideration to one dollar or any other nominal sum, but that he cannot go any farther, would be to confess that the distinction, if it exists, is altogether without substance. The instrument would be defeated in either case. It is quite certain that by recent adjudications deeds and other instruments have been defeated, in a great variety of cases, by parol proof of want of consideration, or that they were delivered upon conditions which would render their use for any other object a fraud upon the maker, or that the purpose for which delivery was made was different from that indicated upon their face. It will be sufficient to refer to some of the cases without further comment. (*Reynolds v. Robinson*, 110 N. Y. 654; *Blewitt v. Boorum*, 142 id. 357; *Andrews v. Brewster*, 124 id. 433.) So, also, actions to foreclose mortgages have been defeated upon allegations and proof differing in no substantial respect from that appearing in this

case. (*Briggs v. Langford*, 107 N. Y. 680; *Hannan v. Hannan*, 123 Mass. 441; *Wearse v. Peirce*, 24 Pick. 141; *Hill v. Hoole*, 116 N. Y. 299; *Davis v. Bechstein*, 69 id. 440; *Parkhurst v. Higgins*, 38 Hun, 113.) There may be cases, no doubt, where the party will be held estopped by his deed from claiming that it is void for want of consideration, especially where by its terms it appears to be an absolute conveyance of land. (*Matter of Mitchell*, 61 Hun, 372.) A voluntary conveyance, intended to take effect as such, and not executory, is generally good between the parties without actual consideration, but that principle has no application to this case. It is not quite correct to say that the defendant was permitted to show by parol that these instruments were never to have any operation or effect. They were in fact executed and delivered for a purpose, though not to secure the payment of money, and they may have accomplished the very object contemplated. That was to protect the defendants against their own improvidence in contracting debts upon the faith of their title to the farm. Whether that purpose was lawful or practicable or possible or the contrary is quite foreign to the inquiry. It is enough to know that such was the motive and consideration in the minds of all the parties which induced the execution and delivery and no other. Having procured them in that way, it would be unconscionable now for the mortgagee or his personal representative to use or enforce them as obligations for the payment of money.

"The defendants had been in possession of the farm under the final contract between them and their father to convey it to them, in consideration of the amount found due upon the settlement, for more than a year before the deeds or mortgages were given. During that time they were in a position to enforce specific performance, and hence the execution and delivery of the mortgages were purely voluntary acts on their part, and constituted, so far as appears, no element of the consideration for the deeds.

"The acts and declarations of the mortgagee with respect to the consideration, conditions and purpose under which the instruments were made and delivered, being admissions against his interests, would have been competent proof against him

in a suit to enforce the mortgages in his lifetime, and hence are now competent against the plaintiff who represents him. (*Holmes v. Roper*, 141 N. Y. 67; *Lyon v. Ricker*, Id. 225; *Hobart v. Hobart*, 62 id. 80.)

"We think there was no error in the result and that the judgments should be affirmed, with costs."

W. A. Sutherland for appellant.

George A. Benton for respondent.

O'BRIEN, J., reads for affirmance.

BARTLETT, J., concurs; PECKHAM and GRAY, JJ., concur in the result; ANDREWS, Ch. J., dissents; HAIGHT, J., not sitting.

Judgments affirmed.

NELLIE SISCO, as Administratrix, etc., Respondent, v.
THE LEHIGH AND HUDSON RIVER RAILWAY COMPANY,
Appellant.

(Argued April 8, 1895; decided April 16, 1895.)

MOTION to correct remittitur. (See report of case, *ante*, page 296.)

Isaac H. Maynard and *John J. Beattie* for motion.

John W. Lyon opposed.

Agree to grant motion; no opinion.

All concur.

Motion granted.

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ABATEMENT AND REVIVAL.

A., one of the original plaintiffs in an action to compel specific performance by vendee of a contract to purchase real estate, died after the trial. The deed tendered on the trial, which was duly executed and acknowledged by A. and the other plaintiffs, was placed under the control of the court in the hands of the clerk. *Held*, that the death did not abate the action, nor was it necessary that a new conveyance from his heirs should be procured; that the delivery to the clerk was a good delivery in *escrow*, which was not defeated by the death. *Webster v. K. O. T. Co.*, 275

ACCOUNTING.

M., who had been carrying on the ice business, died leaving a will by which his sons were made residuary legatees. After their father's death the sons took possession of said property and thereafter carried on the ice business as co-partners. The executors named in the will having renounced, the sons were appointed administrators with the will annexed. They filed an inventory of the estate including therein the ice plant, tools and fixtures formerly used by the testator in said business and the stock on hand. They, pursuant to an order of the surrogate, caused notice for the presentation of claims to be duly published, and paid in full the claims presented, also the specific legacies and funeral expenses. The payments thus made exceeded by more than \$2,000 the whole appraised value of the estate. Five years thereafter the sons sold the business and the property connected therewith. The bill of sale included many articles purchased by the sons after the death of M., existing contracts

for the sale of ice, and the stock of ice then on hand, which was on premises leased by them and in which the testator never had any interest. The bill of sale also contained a covenant on the part of the vendors not to engage in the ice business for ten years without the consent of the vendee. In an action for the foreclosure of a mortgage given by M., a deficiency judgment was rendered after the sale so made by the sons, against them as administrators. Upon an accounting in proceedings instituted by the judgment creditor, the administrators charged themselves with the appraised value of said ice plant, tools and machinery as stated in the inventory. It was not shown that any of the testator's personal property was omitted from the inventory, or that any article therein named was appraised at less than its full value; but the creditor claimed and the surrogate decided that as no accounting was had and the administrators continued the business, using therein the property used by the testator without any formal transfer of title, the business, its profits, accretions and proceeds belonged to the estate, and the administrators were surcharged with the difference between the inventoried value of said property and the sum received by them on the sale. *Held*, error. *In re Mullon*. 96

AGREEMENT.

See CONTRACT.

APPEAL.

1. Where the defendant at the close of the evidence on trial of an action by a jury, moves the court to direct a verdict in his favor,

- without specifying any ground, and the motion is denied and he excepts, and a verdict is rendered against him, he cannot maintain his exception on appeal by showing that there was a defect in the proof upon some points, and so that the facts did not authorize the verdict, provided that the failure of proof might have been supplied, had the attention of the other side been called to the defect. *Haines v. N. Y. C. & H. R. R. Co.* 235
2. While the determination of the General Term upon all questions as to the weight of evidence is final, and not reviewable here, where there is no conflict in the evidence, or that which appears to be in conflict is but a mere scintilla, or is met by well-known and scientific facts about which there is no conflict, this court may review the decision, if contrary to the evidence, and reverse it. *Hudson v. R., W. & O. R. R. Co.* 408
3. An order of a Surrogate's Court fixing the fees of appraisers of the estate of a deceased testator is a final order affecting a substantial right, and so is appealable to the General Term and to this court. (Code Civ. Pro. §§ 2570, 190.) *In re Harriot.* 540
4. The N. Y. L. I. & T. Co., as executor of the will of H., commenced an action to have its accounts as such settled. The legatees under the will objected to items in the account stated to have been paid the appraisers of the estate for their services; these had not been verified by affidavit of the executor and adjusted by the surrogate before payment as prescribed by the statute then in force. (Chap. 225, Laws of 1873; see, also, Code Civ. Pro. § 2711, as amended in 1893.) Pending the trial of the action before a referee, the executor, upon affidavits of the appraisers and their stipulation as attorneys for the executor, procured an order from the surrogate taxing their fees at \$250 each. The legatees, under the will, thereupon, upon notice to the executor and appraisers, moved for an order vacating the order taxing said fees, which motion was denied, and the surrogate's order was affirmed by the General Term. *Held*, that the legatees had the right to make the motion, and that the orders below were reviewable here. *Id.*
5. P., by his will, gave to his daughter F. \$20,000 in trust, "the same to revert at her death without issue" to the testator's widow and son. In an action brought by the executors it was adjudged that the fund was payable to F.; that she was, however, not at liberty to spend or waste the principal, but was bound to keep it securely invested for the benefit of the remaindermen. The money was paid over to F. pursuant to the judgment. The widow thereafter died, and her executor made a motion at the foot of the decree for an order requiring F. to give security for the fund. These facts appeared thereon: The whole fund having been hopelessly lost by unfortunate investments, F. insured her life for \$20,000 to provide for its ultimate restitution. Her mother protested against this, asked F. not to continue the policies, and promised to forgive her the loss, and not call upon her for the fund. F. paid the premiums for a time, and then notified her brother of her inability to continue this, and suggested that he continue the policies; this he refused; she thereupon allowed \$10,000 of the insurance to lapse. The court required F. to give security for the one-half of the fund payable to the brother, but refused the application as to the one-half going to the mother. F. complied with the order. On appeal by the executor, *held*, that there was no absolute legal right to the security sought, but the matter rested in the reasonable discretion of the Special Term; and that this discretion had been exercised in behalf of the moving parties as fully as was justified. *Hitchcock v. Peaslee.* 547
6. A judgment will not be reversed because the trial court has drawn from facts properly in the case for other purposes an erroneous legal conclusion as to a question not

necessarily involved in the case or essential to its determination.
Knoch v. Von Bernuth. 648

— *When order granting temporary injunction not reviewable here.*
See Castoriano v. Dupe. 250

— *As to sufficiency of evidence to justify submission to jury, and so to prevent review here in an action of assault alleged to have been committed under such circumstances as to constitute the crime of rape.*
See Dean v. Raples. 319

— *When disallowance by surrogate of credit for counsel fees in the accounts of an executor is within discretion of surrogate and not reviewable here.*
See In re O'Brien. 379

APPRAISERS.

1. Appraisers are officers of the court, and the amount of their fees being fixed by statute (Code Civ. Pro. § 2565), they have no right to demand or receive more than the statute allows, however large the estate may be, unless the parties interested consent. *In re Harriot.* 540
2. It appeared by the affidavits upon which the motion to vacate was made that the estate, aside from household furniture and items of cash on hand, consisted of twenty-seven different items of corporate stock and other securities; that the counsel for the legatees filled out the inventory, except as to the securities and cash, and this part was prepared by the executor; that the furniture was appraised in a lump sum, and the appraisers had nothing to do in regard thereto save to see that the furniture was in the house; that the value of the securities could have been ascertained in a single day's time. No affidavits were read in opposition. The surrogate, however, took into consideration the affidavits of the appraisers used on the original motion, which, without giving any items, stated generally that each of them had actually and necessarily been employed more than fifty days. The surrogate so

found. *Held*, that the facts did not justify the finding, and that the order denying the motion to vacate was error. *Id.*

ASSAULT.

In an action to recover damages for an assault which, as set forth in the complaint, was committed in such manner and under such circumstances as to constitute the crime of rape, these facts appeared: In April, 1885, defendant took the plaintiff, who was an orphan fourteen years of age, to his home under an arrangement with her and her relatives, with whom she was then living, that he would board, clothe and educate her; she to become a member of his family, to perform such duties and receive such care and attention as a girl of her age would be entitled to receive from parents in the same condition of life. About a year thereafter, as plaintiff testified, defendant committed an assault upon her in a barn, where they were alone together, and had connection with her without her consent; that she begged him to let her go, asked him to desist, and resisted him to the best of her ability; that after the outrage he told her to stop crying, go to the house and keep still about it, and if she told any one it would be the worse for her; that on several subsequent occasions within a year thereafter he committed substantially similar assaults, he at each time commanding her never to tell and threatening her if she did, but did not threaten to do her any bodily harm. She made no outcry on any occasion, and it appeared that an outcry, if made, would have been heard by some one. Plaintiff was a slight, nervous girl; defendant a strong, powerful man; and the evidence justified a finding that he exercised a great influence and control over her will. In consequence of the assaults she became ill, having nervous spasms, etc. The action was commenced about three years after the last assault, and not until about the time of its commencement did plaintiff disclose the facts alleged. *Held*

(PECKHAM and BARTLETT, JJ., dissenting), that while, in order to maintain the action, it was necessary to satisfy the jury that if defendant had the criminal connection with plaintiff it was accompanied with intent on his part to effect that purpose in defiance of all resistance and without her consent and against her will, and that she resisted to the best of her ability, under all the circumstances, the evidence was sufficient to authorize the submission of these questions to the jury; and so, that with its determination this court could not interfere.

Dean v. Raplee. 319

ASSESSMENT AND TAXATION.

1. As a special partner is not personally liable for any of the partnership debts, in the assessment of his personal property for the purposes of taxation he is not entitled to a deduction of any portion of the indebtedness of the firm under the provision of the Revised Statutes (1 R. S. 890, 891, § 9, sub. 4), as amended in 1892 (§ 1, chap. 202, Laws of 1892), which authorizes a deduction of "the just debts owing by him." *People ex rel. v. Barker.* 239
2. Where, therefore, a non-resident, who had no property within the state except a sum contributed by her as a special partner to a partnership, was assessed the amount so contributed under the provision of the act of 1855 (§ 1, chap. 37, Laws of 1855), which provides that non-residents doing business in this state as special partners "shall be assessed and taxed on all sums invested in any manner in said business the same as if they were residents," *held*, that she was not entitled to any deduction on account of the partnership indebtedness. *Id.*
3. In proceedings by certiorari to review the appraisal of the state comptroller fixing the amount of the relator's capital stock employed within this state, the latter objected to the appraisal on the ground that it is a manufacturing company, wholly engaged in

carrying on manufacture in this state. These facts appeared: The relator is engaged in the sale of spices, baking powder, coffee and tea, purchasing these articles in bulk. The spices and baking powder are merely put up by it in packages for sale. Various kinds of tea are mixed together, the compound being called and sold as "combination tea." The coffee is purchased in the raw bean, then roasted and ground, and, in some instances, different kinds are mixed together. *Held*, that this was not manufacture, and so the relator could not be regarded as a manufacturing corporation.

People ex rel. v. Roberts. 375

4. In an action of replevin, brought in the name of the People by the forest commission, to recover logs cut by defendant upon lands included in what is known as the "forest preserve of the state of New York," plaintiff claimed title through a conveyance to the state by the comptroller, who had purchased the lands at tax sales made for unpaid taxes for the years 1866 to 1870 inclusive; this conveyance was executed after the two years allowed for redemption had expired; the deed to the state was recorded three years before the passage of the act of 1885 (Chap. 448, Laws of 1885), which provides that all conveyances theretofore executed by the comptroller, "after having been recorded for two years, * * * shall, six months after this act takes effect, be conclusive evidence that the sale and all proceedings prior thereto * * * were regular." This action was brought after the expiration of the six months. Defendant claimed that the tax sale was illegal and void for the reason that the unpaid tax for 1867 was based on an assessment roll verified before the third Tuesday of August, and that in 1870 the assessors omitted to meet on the third Tuesday of August. *Held*, that these were not jurisdictional defects, but simply irregularities in the proceedings; that conceding the irregularities to have been such as to render the sale invalid, the owner had his remedy and an opportunity to be

heard, by appeal to the board of supervisors, and also by appearance before the comptroller and demand for the cancellation of the tax; and that after the expiration of the six months the defects were cured by the statute. *People v. Turner.* 451

5. Also, *held*, that through the comptroller's purchase and deed the state was constructively in possession, and this constructive possession was made an actual possession by the powers and duties devolved upon the forest commission as its representative by said act of 1885. *Id.*

6. Defendant claimed an actual occupancy of part of the lands sold, and that as no notice to redeem was served on the occupant no title was acquired under the sale. It appeared that the land was wild, uncultivated and unimproved forest land, with a small natural meadow thereon, upon which one M., by leave of the owner, at some time after 1871, entered, cut and hauled away grass; also, that on two occasions M. scattered a little grass seed thereon and at times dammed up a brook so as to overflow about half an acre. There was no building on the land and it was fenced. *Held*, that the proof failed to establish any such actual occupancy as called for a compliance with the statutory provision requiring service upon the occupant of notice to redeem. *Id.*

7. In proceedings by certiorari to review the action of the state comptroller in assessing so much of the capital of the relator as is employed in this state, it appeared that the relator, a corporation engaged in manufacturing telephone and telegraph apparatus, is an Illinois corporation, having its main office and principal manufactory in that state, but conducting an extensive manufacturing business in this state, and also purchasing and selling general electric supplies not manufactured by it. This it is authorized to do by its charter. *Held*, that the relator was not wholly engaged in

carrying on manufacture in this state, and so, was not exempt by the Corporation Tax Act (§ 8, chap. 542, Laws of 1880, as amended by chap. 198, Laws of 1889) from taxation on the amount of its capital employed here. *People ex rel. v. Campbell.* 587

— *When it is the duty of remaindermen to pay taxes.*
See Clarke v. Clarke. 476

ASSIGNMENT (FOR BENEFIT OF CREDITORS).

1. An assignment for the benefit of creditors must be interpreted like other instruments, according to the intent of the parties, and if possible such a construction given it as will sustain rather than defeat it. *Roberts & Co. v. Buckley.* 215
2. The *onus* is upon the party charging fraud in such an instrument to show affirmatively some illegal provision, or some act consciously and purposely done which is inconsistent with an honest purpose. *Id.*
3. A direction in the assignment for the payment of a debt at a greater amount than is justly due, will not invalidate the assignment in the absence of a fraudulent intent. *Id.*
4. When the instrument is assailed as fraudulent because it provides for the payment of a fictitious debt it must appear that the assignor, with a fraudulent purpose in view, knowingly and consciously directed the payment of a claim which to his knowledge had no existence, either in whole or in some substantial part. *Id.*
5. The question as to the validity of an assignment is to be determined by the facts existing at the time it was made, and, if when delivered it represented an honest purpose and was made in good faith, fraud cannot be fastened upon it thereafter by any act or statement, whether verbal or written, of the assignor. *Id.*

6. An assignment for the benefit of creditors preferred and directed the assignee to pay in full certain debts enumerated in a schedule annexed, with interest. In the schedule M. was named as a creditor. In a column headed "Form of debt" was this statement "account and notes which assignors are unable to describe." The amount was stated to be "about \$12,000." In a column headed "Date for interest," were specified six items, with different dates attached, amounting in all to \$12,000; then followed this statement, "as near as assignors are able to state." Twenty days after the assignment was made the assignors filed the inventory and schedules required by the statute (§ 3, chap. 466, Laws of 1877). In these the amount of the debt to M., and the several items thereof, with the dates attached, were given, as stated in the assignment, but without any qualifying words. In an action to set aside the assignment because of alleged fraud, various items of indebtedness to M., consisting of notes and checks, were produced and proved, and the referee found that the assignors were indebted to him thereon at the date of the assignment in the sum of \$12,656.88. It appeared that one item of \$1,500 named in the schedule, had been paid and was inserted by mistake; also, that the obligations produced differed in dates and amounts, in some cases slightly, in others materially, from the dates and amounts stated in the schedule. These facts also appeared and were found by the referee: When the assignment was made M. was in the west, in the service of the government. The firm of attorneys who drew the assignment obtained the data relating to the debt in question from M.'s attorneys. The assignment was then drawn and presented by a member of said firm to the assignors for examination; they were unable to describe the debt with accuracy; some of the books upon which it appeared were not in their possession, and some portion of it was for moneys paid by M. to third parties for the benefit of the assignors, and there-
upon the qualifying words were inserted in the schedule. The other member of said firm, who drew the assignment, and who had not been informed of the change made, drew the inventory from the same data used by him in drawing the assignment, without inserting the qualifying words; he intending in both papers to describe the same debt and in the same way. The referee found that the assignors verifying the inventory intended to set forth the indebtedness without stating the precise items and without intending to modify or change the statement contained in the assignment, and acted in good faith without any intent to hinder, delay or defraud creditors. *Held*, that the preference and so the assignment were properly adjudged to be valid; that the preferred creditors had the right to prove any honest debts to the extent of about \$12,000, irrespective of the amounts and dates given in the schedule; and that the variance shown was immaterial. *Id.*
7. On the same day the assignment was recorded a judgment in an action brought by M. against the assignors was entered upon an offer of judgment. The judgment was in excess of the real indebtedness by over \$800. The complaint asked relief against this judgment. The referee found that that amount was excessive but not fraudulent, and that it was rendered in good faith, for the purpose of securing an honest debt. The judgment was subsequently, on application to the court, modified and reduced to the true amount. *Held*, that the court had power to so correct the judgment; also, that even if it had not been corrected, it was good for the sum actually due. *Id.*
8. After a former trial in this action and a reversal on appeal of the judgment rendered therein in favor of the contesting creditors, the County Court made an order amending the inventory *nunc pro tunc*, so as to conform substantially to the statement of the debt in the assignment. *Held*, that the County Court had power

to make the order, and when made it was as much part of the assignment as the inventory which it modified, and as the referee found that it could not operate, as against the contesting creditors, to impair or prejudice any rights or liens which they had acquired against assigned property prior to the entry of the order, the creditors were protected and without any legal or just ground for complaint. *Id.*

ATTORNEY AND CLIENT.

The protection extended by the statute (Code of Civ. Pro. § 885) to communications between attorney and client does not cover communications made to a friend, or to an attorney in the presence of a friend. *People v. Buchanan.* 1

ATTORNEY-GENERAL.

In an action brought by the attorney-general to vacate the charter of defendant, a domestic corporation, and to annul its corporate existence, these facts appeared: In defendant's charter the object of its organization was stated to be the "buying and selling of milk at wholesale and retail." A large majority of the stockholders were milk dealers in the city of New York, and creamery or milk commission men in that vicinity. At the first meeting of its board of directors a by-law was adopted declaring that said board "shall have the power to make and fix the standard or market price at which milk shall be purchased by the stockholders of the company." Acting under this by-law the board fixed from time to time the price of milk to be paid by dealers. No milk was purchased by defendant, but it did a commission business, selling milk for farmers to dealers, who would purchase at the price fixed, guaranteeing payment and charging a commission therefor. The prices so fixed largely controlled the market in and about said city. *Held* (PECKHAM, J., dissenting), that the evidence justified a finding that the corporation was a combination inimical

to trade and commerce, and so unlawful, and that a judgment granting the relief sought was proper. *People v. Milk Exchange.* 267

BANKS AND BANKING.

1. A creditor of a domestic banking corporation, seeking to charge a stockholder under the statute, is bound to allege and prove all the facts upon which the liability depends; he must aver the performance of conditions precedent, or set forth facts which in law excuse their performance. *Hirshfeld v. Bopp.* 84
2. Under the section of the Banking Law (§ 52, chap. 689, Laws of 1892) which provides that "except as prescribed in the Stock Corporation Law," the stockholders of a banking corporation shall be individually responsible for its debts to the extent of the amount of their stock, etc., the provisions of the Stock Corporation Law, having general application, which relate to the liability of stockholders in corporations, are to be considered as incorporated in the section, and the words "except as prescribed in" are to be construed as though the language was "subject to the limitations in." *Id.*
3. The liability, therefore, of a stockholder of a banking corporation is subject to and limited by the conditions affixed to the liability of stockholders prescribed by the "Stock Corporation Law" (§ 55, chap. 688, Laws of 1892), i. e., (1) the recovery of a judgment against the corporation for the debt and the return of an execution thereon unsatisfied; (2) that the debt was payable within two years from the time it was contracted; (3) that the action against the corporation was brought within two years after the debt became due, and, if the action is brought against a stockholder after he ceased to be such, that it be brought within two years after that time. *Id.*
4. The complaint in an action brought by a creditor of a bank-

ing corporation, in his own behalf and that of other creditors, against stockholders, neither averred the recovery of a judgment against the corporation for the debt owing to plaintiff, nor that action has been brought thereupon against it, and there were no proper allegations in the complaint setting forth an excuse for the non-performance of that condition. There was no averment as to the time when the debts owing by the bank were contracted, or that they were payable within two years. *Held*, that a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, was properly sustained. *Id.*

5. *It seems*, that when an action has been brought by the People against such a corporation, and a judgment has been rendered therein dissolving it, sequestrating its property, appointing a receiver, and restraining creditors from bringing suit against it, this is an excuse for the non-performance of the condition precedent requiring a judgment against the corporation and the return of an execution unsatisfied. *Id.*

6. *It seems*, also, that when the insolvency of the corporation has been judicially declared, and all its assets are in the custody of the law for equal distribution among creditors, an action inequity, brought in behalf of all the creditors, against the stockholders, to enforce their liability, in which the receiver is joined as defendant, is a just and reasonable method of ascertaining and having finally determined the respective liabilities of the stockholders. *Id.*

7. While the Banking Law changes in some respects the method of enforcing the liability of stockholders, it does not change its essential character from what it was under the prior law (Chap. 226, Laws of 1849; chap. 469, Laws of 1882), and imposes no new liability. *Id.*

8. The act, therefore, is not unconstitutional, as applicable to stockholders who became such prior to

its passage, and it is not necessary to allege in a complaint against stockholders that they became such after the passage of the act. *Id.*

9. B., in his lifetime, was the agent in the city of New York for plaintiffs, who were carrying on business in Ecuador. Plaintiffs consigned merchandise to B. for sale, the proceeds being credited to their account. B. purchased goods for plaintiffs, which were paid for out of the avails of such sales, or by bills of exchange drawn on plaintiffs; they also drew bills on B., which he accepted, paid and charged to their account. The accounts were settled semi-annually. B. kept his bank account with defendant, the C. E. Bank, to the credit of which his own moneys as well as those belonging to plaintiffs were deposited. Prior to his death he himself, and, after such death, persons claiming to act for his estate, received from plaintiffs bills of exchange, the avails of which were deposited to said account. B. died insolvent. In an action brought to compel said bank to pay from the balance standing to the credit of B. in said bank account, which balance it appeared was wholly derived from the avails of said bills of exchange, a balance due plaintiffs on their account with B., *held*, that while as between plaintiffs and B. the relation of debtor and creditor existed according as the accounts showed a balance due to the one or the other, this did not affect the fact that the relation was of a fiduciary character; that the avails of the bills in excess of what was due B. belonged to plaintiffs, and they had the right in equity to follow them; that the fact that such avails were deposited to the credit of B.'s account did not affect the question as to whom they belonged; and that plaintiffs were entitled to the relief sought. *Roca v. Byrne*. 182

10. A mortgagor gave to the mortgagee a promissory note, which when paid it was agreed should operate as a payment on the bond secured by the mortgage. The

mortgagee procured the note to be discounted by a bank, and thereafter assigned the securities. In an action to foreclose the mortgage it appeared that the note remained unpaid in the hands of the bank. *Held*, that the transfer of the note operated as a payment *pro tanto* so long as it remained in the hands of a third party and could not be produced and delivered up by the mortgagee; that the bank, however, took no interest in, or right to, the bond and mortgage; and so, was not entitled to have the amount of the note paid to it out of the proceeds of sale, in preference to the claim of the holder of the mortgage for the balance unpaid thereon; but that, the mortgagor having assented thereto, a judgment was proper directing payment of the note out of any surplus arising on the foreclosure sale. *Fitch v. McDowell*. 498

BILLS, NOTES, CHECKS.

Defendant drew a check upon a trust company, payable to his own order, which he indorsed "for deposit," and deposited it to his credit in the M. S. Bank; a half hour thereafter the bank closed its doors and never opened again for business. The check was delivered by the officers of the bank to the St. N. Bank, which was then acting as its clearing house agent. The latter bank on the next day presented the check for payment, which was refused, the drawee having been notified by defendant not to pay it. In an action upon the check the answer alleged the insolvency of the M. S. Bank at the time of the receipt by it of the check; that this was known to its officers; that the check was obtained from defendant by fraud, and that the St. N. Bank knew of such insolvency prior to the time of the deposit of the check by defendant. On the trial defendant offered to prove statements of the officers of the M. S. Bank made the day prior to that of the deposit showing knowledge of its insolvency; this was excluded. *Held*, error; that permitting defendant to make the deposit in reliance upon the sup-

posed solvency of the M. S. Bank, with knowledge on the part of its officers of its insolvency, was a fraud upon him, and this he had a right to establish, and for that purpose the evidence excluded was competent. The court also excluded evidence tending to show that the officers of the St. N. Bank had knowledge of the insolvency before the time of the deposit. *Held*, error. *Grant v. Walsh*. 502

BONA FIDE HOLDER.

1. One who has been induced to part with his property by the fraud of another, under guise of a contract, may, upon discovery of the fraud, rescind the contract and reclaim the property unless it has come into the possession of a *bona fide* holder. *Grant v. Walsh*. 502
2. Where the fraud is proved the burden is upon a third party claiming title to show that he is a *bona fide* holder. *Id*.

BOND.

1. Under the provision of the Mechanics' Lien Law (sub. 6, § 24, chap. 342, Laws of 1885) authorizing the owner of premises, against which a lien has been filed, to discharge the lien by executing a bond as specified, "conditioned for the payment of any judgment against the property," a bond so given takes the place of the property and becomes the subject of the lien, the same as moneys paid into court, or securities deposited after suit brought to foreclose the lien. *Morton v. Tucker*. 244
2. The remedy, therefore, to enforce the obligations of the sureties to such a bond is not by an action at law upon the bond, but by an action in equity in which all persons interested, including the sureties on the bond, are made parties, and it is not a condition precedent to the bringing of the action that the lienor shall exhaust his remedy against the landowner by recovering a judgment of fore-

closure in form against the property described in the notice of lien. *Id.*

3. The complaint in such an action should be in the usual form of a complaint in an action to foreclose the lien, with the exceptions that it should allege the giving of the bond and the consequent discharge of the lien, and instead of asking judgment for the sale of the premises it should demand relief against the persons executing the bond for the amount that shall be determined to be payable upon the lien. *Id.*

BURDEN OF PROOF

The *onus* is upon the party charging fraud in an assignment for the benefit of creditors to show affirmatively some illegal provision, or some act consciously and purposely done which is inconsistent with an honest purpose. *Roberts & Co. v. Buckley.* 215

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- Whitaker v. D. & H. C. Co.* (126 id. 549), distinguished. *Cameron v. N. Y. C. & H. R. R. Co.* 407
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- Am. Sugar Ref. Co. v. Fancher* (81 Hun, 56), reversed. *American Sugar Ref. Co. v. Fancher.* 552
- Bishop v. Grand Lodge, etc.* (112 N. Y. 627), distinguished. *Sulz v. Mutual Reserve Fund Life Assn.* 575
- People ex rel. Tiffany v. Campbell* (144 N. Y. 166), distinguished. *People ex rel. Western Electric Co. v. Campbell.* 589
- Truesdell v. Bourke* (80 Hun, 55), reversed. *Truesdell v. Bourke.* 612

CAUSE OF ACTION.

A notary public who, before the Constitution went into effect, had rightfully received a free pass over a railroad, is, by said provision, prohibited from thereafter using it while he continues to hold the office, and for a violation of this provision by a notary public, an action by the People is maintainable against him to have his office adjudged to be forfeited. *People v. Rathbone.* 434

— *As to sufficiency of evidence to justify submission to jury, and so to prevent review here in an action of assault alleged to have been committed under such circumstances as to constitute the crime of rape.*

See Dean v. Raplee. 319

See CONTRACTS.
CREDITOR'S SUIT.
EQUITY.
INJUNCTION.
SPECIFIC PERFORMANCE.

CERTIORARI.

1. In proceedings by certiorari to review the appraisal of the state comptroller fixing the amount of the relator's capital stock employed within this state, the latter objected to the appraisal on the ground that it is a manufacturing company, wholly engaged in carrying on manufacture in this state. These facts appeared: The relator is engaged in the sale of spices, baking powder, coffee and tea, purchasing these articles in bulk. The spices and baking powder are merely put up by it in packages for sale. Various kinds of tea are mixed together, the compound being called and sold as "combination tea." The coffee is purchased in the raw bean, then roasted and ground, and, in some instances, different kinds are mixed together. *Held*, that this was not manufacture, and so the relator could not be regarded as a manufacturing corporation. *People ex rel. v. Roberts.* 375

2. *It seems*, that the return of the comptroller to a certiorari to review his appraisal of the capital of a corporation should set forth the items of the appraisal, instead of simply giving the total, and making the evidence a part of the return. *Id.*

CHECKS.

See BILLS, NOTES AND CHECKS.

CODES.

See CODE OF CIVIL PROCEDURE.
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CODE OF CIVIL PROCEDURE.

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COMPTROLLER.

1. In proceedings by certiorari to review the appraisal of the state comptroller fixing the amount of the relator's capital stock employed within this state, the latter objected to the appraisal on the ground that it is a manufacturing company, wholly engaged in carrying on manufacture in this state. These facts appeared: The relator is engaged in the sale of spices, baking powder, coffee and tea, purchasing these articles in bulk. The spices and baking powder are merely put up by it in packages for sale. Various kinds of tea are mixed together, the compound being called and sold as "combination tea." The coffee is purchased in the raw bean, then roasted and ground, and, in some instances, different kinds are mixed together. *Held*, that this was not manufacture, and so the relator could not be regarded as a manufacturing corporation. *People ex rel. v. Roberts.* 375

2. *It seems*, that the return of the comptroller to a certiorari to review his appraisal should set forth the items of the appraisal, instead of simply giving the total, and making the evidence a part of the return. *Id.*

3. In an action of replevin, brought in the name of the People by the forest commission, to recover logs cut by defendant upon lands included in what is known as the "forest preserve of the state of New York," plaintiff claimed title through a conveyance to the state by the comptroller, who had purchased the lands at tax sales made for unpaid taxes for the years 1866 to 1870 inclusive; this conveyance was executed after the two years allowed for redemption had expired; the deed to the state was recorded three years before the passage of the act of 1885 (Chap. 448, Laws of 1885), which pro-

vides that all conveyances theretofore executed by the comptroller, "after having been recorded for two years, * * * shall, six months after this act takes effect, be conclusive evidence that the sale and all proceedings prior thereto * * * were regular." This action was brought after the expiration of the six months. Defendant claimed that the tax sale was illegal and void for the reason that the unpaid tax for 1867 was based on an assessment roll verified before the third Tuesday of August, and that in 1870 the assessors omitted to meet on the third Tuesday of August. *Held*, that these were not jurisdictional defects, but simply irregularities in the proceedings; that conceding the irregularities to have been such as to render the sale invalid, the owner had his remedy and an opportunity to be heard, by appeal to the board of supervisors, and also by appearing before the comptroller and demand for the cancellation of the tax; and that after the expiration of the six months the defects were cured by the statute. *People v. Turner.* 451

4. Also, *held*, that through the comptroller's purchase and deed the state was constructively in possession, and this constructive possession was made an actual possession by the powers and duties devolved upon the forest commission as its representative by said act of 1885. *Id.*

5. Defendant claimed an actual occupancy of part of the lands sold, and that as no notice to redeem was served on the occupant no title was acquired under the sale. It appeared that the land was wild, uncultivated and unimproved forest land, with a small natural meadow thereon, upon which one M., by leave of the owner, at some time after 1871, entered, cut and hauled away grass; also, that on two occasions M. scattered a little grass seed thereon and at times dammed up a brook so as to overflow about half an acre. There was no building on the land and it was uninclosed. *Held*, that the proof failed to establish any such

actual occupancy as called for a compliance with the statutory provision requiring service upon the occupant of notice to redeem. *Id.*

6. In proceedings by certiorari to review the action of the state comptroller in assessing so much of the capital of the relator as is employed in this state, it appeared that the relator, a corporation engaged in manufacturing telephone and telegraph apparatus, is an Illinois corporation, having its main office and principal manufactory in that state, but conducting an extensive manufacturing business in this state, and also purchasing and selling general electric supplies not manufactured by it. This it is authorized to do by its charter. *Held*, that the relator was not wholly engaged in carrying on manufacture in this state, and so, was not exempt by the Corporation Tax Act (§ 3, chap. 542, Laws of 1880, as amended by chap. 193, Laws of 1889) from taxation on the amount of its capital employed here. *People ex rel. v. Campbell.* 587

CONFIDENTIAL RELATIONS.

When a person, through the influence of a confidential relation, acquires title to property, the court, to prevent an abuse of confidence, may impress upon the property an implied trust and so grant relief. *Goldsmith v. Goldsmith.* 818

CONSIDERATION.

1. An oral promise by one person to indemnify another for becoming a guarantor for a third is not within the Statute of Frauds, and need not be in writing, and the assumption of the responsibility is a sufficient consideration for the promise. *Jones v. Bacon.* 446

2. In an action by plaintiff as executrix of B. to foreclose two mortgages these facts appeared: B. in his lifetime was the owner of three farms, all of which had been paid for and improved with the aid of the services of his two sons, who had worked for him after their majority. On a settlement

between the parties it was agreed that B. was indebted to his sons in the sum of \$5,000, and in consideration thereof he deeded to each of them an undivided one-half of one of the farms. The evidence tended to show and the trial court found that the intention was to vest in the sons the title in the farm, but the father, fearing that the farm might be lost by the sons in speculation, to prevent this, required each of his sons to give to him a mortgage for \$1,500 on the farm, which were the mortgages in suit; no bond was given, no actual debt was intended to be secured, and the mortgages were not recorded in B.'s lifetime. *Held*, that there was no consideration for the mortgages; and so, that the actions were not maintainable. *Baird v. Baird*. 650

CONSTITUTION.

1. A notary public is a public officer within the meaning of the provision of the State Constitution (Art. 13, § 5) prohibiting a "public officer or a person elected or appointed to a public office under the laws of this state" from receiving from any person or corporation or making use of "any free pass, free transportation," etc. *People v. Rathbone*. 484
2. A city has no power to take and appropriate the natural and permanent banks of a non-navigable stream within the municipality without paying to the owner compensation therefor. *City of Schenectady v. Furman*. 482

CONSTITUTIONAL LAW.

1. The legislature, in the exercise of its power to conserve the public health, safety or welfare, may direct that certain improvements or alterations shall be made in existing houses at the owners' expense, and while the requirement must not be unreasonable, either with reference to its nature or cost, yet, when it clearly appears that it tends, in some plain and appreciable manner, to guard and protect the public in the respects

specified; that it bears equally upon all members of the same class, and that the cost will not be unreasonable, considering the character of the work required, with reference to the object to be attained, the requirement is constitutional and valid. *Health Deptmt. v. Rector, etc.* 32

2. It is not requisite to the validity of a legislative enactment of a police nature, which may disturb the enjoyment of individual rights, that provision for compensation for such disturbance be made, where the act does not appropriate private property, but simply regulates its use and enjoyment by the owner. *Id.*
3. The provision of the New York Consolidation Act (§ 668, chap. 410, Laws of 1882, amended by chap. 84, Laws 1887), declaring that tenement houses in the city previously erected shall be furnished by the owners with water, "when they shall be directed so to do by the board of health, in sufficient quantity at one or more places on each floor occupied or intended to be occupied by one or more families," is a proper exercise of the police power of the state, both as a guard to the public health and as a protection against fire, and is constitutional. (*BARTLETT, J., dissenting.*) *Id.*
4. While the Banking Law (Chap. 689, Laws of 1892) changes in some respects the method of enforcing the liability of stockholders, it does not change its essential character from what it was under the prior law (Chap. 226, Laws of 1849; chap. 469, Laws of 1882), and imposes no new liability. The act, therefore, is not unconstitutional, as applicable to stockholders who became such prior to its passage, and it is not necessary to allege in a complaint against stockholders that they became such after the passage of the act. *Ilirshfeld v. Bopp*. 84
5. Adding a foreign and artificial ingredient to a food product, even for the purposes of color merely, is in effect an adulteration, and the

legislature has the power absolutely to prohibit it. *People v. Gerard.* 105

6. The provision of the act, "to prevent deceptions in sales of vinegar" (§ 4, chap. 515, Laws of 1889), declaring that "no person shall manufacture, produce, sell or keep for sale any vinegar which shall contain any preparation * * * injurious to health, or any artificial coloring matter," is constitutional. The prohibition against "coloring matter" is for the prevention of fraud; as the coloring of vinegar can only be for the purposes of deception and to defraud the buyer. *Id.*

7. The provision of the new Constitution (§ 12, art. 6), providing that the compensation of the judges and justices thereinbefore mentioned "shall not be increased or diminished during their official terms," is not retroactive in its effect; and so, does not affect statutes increasing compensation enacted before the Constitution went into effect. *People ex rel. v. Fitch.* 261

8. The provision of the New York Consolidation Act (§ 1109, chap. 410, Laws of 1882), as amended in 1893 (Chap. 104, Laws of 1893), providing that where a justice of the Supreme Court residing outside of the first judicial district shall be designated as one of the justices of the General Term in the first judicial department, he shall be paid by the city "such sum as shall be certified to be reasonable by the presiding justice" of that department, is a proper and constitutional exercise of legislative power. It is not a provision for compensation for services, but simply a scheme for reimbursing expenses and disbursements; and so, is not invalidated or affected by the provision of the old Constitution (§ 14, art. 6, as amended in 1867), declaring that the compensation of judges and justices therein named for their services shall not be decreased during their official terms; nor does the said statutory provision tend in any way to disturb the policy that seeks to main-

tain uniformity of salary among judicial officers of the same grade. *Id.*

CONSTRUCTION.

An assignment for the benefit of creditors must be interpreted like other instruments, according to the intent of the parties, and if possible such a construction given it as will sustain rather than defeat it. *Roberts & Co. v. Buckley.* 215

CONTEMPT.

1. The provision of the United States Revised Statutes (§ 725), providing that the United States courts shall have power to punish "by fine or imprisonment, at the discretion of the court, contempt of their authority," limits the power to the modes of punishment specified and operates as a negation of any other method. *Hovey v. Elliott.* 126

2. The said provision applies to the Supreme Court of the District of Columbia. *Id.*

3. The said court having been created by act of congress, not by the Constitution, congress may restrict and limit the exercise of its power in the respect specified, and this although it may have given it general jurisdiction in law and equity. *Id.*

4. The said provision applies to civil as well as to criminal contempts. *Id.*

5. Plaintiff's firm filed a bill in said court to enforce an alleged lien upon an award. R., a member of the firm of R. & Co., bankers, was appointed receiver, and a portion of the award, sufficient to meet plaintiff's claim, was paid over to him. Pursuant to the directions of the court, the receiver invested the fund in certain bonds. The defendants demurred to plaintiff's bill, the demurrer was sustained and a decree entered dismissing the bill and directing the receiver to pay over the funds in his hands to the defendants. R. thereupon delivered the bonds to

defendants, who on the same day sold them for full value to R. & Co. The decree was reversed on appeal, an answer was interposed, and pending the trial of the issues defendants were adjudged in contempt for disobedience of an order of the court, their answer ordered to be stricken out, and thereupon a judgment *pro confesso* was entered adjudging that plaintiffs had a lien upon the bonds. In an action based on said judgment, brought against R. & Co. to enforce the lien, it did not appear that they had any notice of the contempt proceedings. *Held*, that the court had no jurisdiction to strike out the answer; that said judgment was void as against R. & Co.; that as purchasers *pendente lite* they took the risk of the litigation then pending, but did not assume the risk of any punishment inflicted on the defendants therein in an independent proceeding; and so, that the complaint herein was properly dismissed. *Id.*

CONTRACTS.

1. As a general rule the owner of real estate, from the time of the execution by him of a valid contract for the sale thereof, is to be treated as the owner of the purchase money and the vendee as equitable owner of the land. *Williams v. Haddock.* 144
2. Provisions in such a contract making performance on the part of the vendee of his contract to pay a portion of the purchase money and to secure the balance by mortgage on the premises a condition precedent to a conveyance by the vendor do not take the case out of the general rule. *Id.*
3. *It seems*, that after a default in the performance of these conditions precedent the rule may not apply. *Id.*
4. But prior to a default on the part of the vendee, even where by the contract time is of the essence thereof, there is an equitable conversion within said rule, subject to be reconverted upon the default happening. *Id.*

5. A parol gift of real estate and a parol promise to convey the same is valid and enforceable in equity, where the donee has entered into possession of the property and made permanent improvements thereon, on the faith of the donor's promise, and this, although when specific performance by the donee is claimed, the rental value of the property for the time it has been occupied by the latter would be more than the amount expended by him. *Young v. Overbaugh.* 158

6. In 1872 C., plaintiff's testator, who was half-brother of defendant, and at whose request she and her husband had come to the city of Kingston to reside, requested the husband to build a house for her on land owned by C., at a cost specified, and to bring the bills to him for payment. The house was built at a cost exceeding by about \$1,200 the sum named, which sum C. paid, and defendant went into occupation thereof and made valuable improvements upon the premises, of which C. had knowledge. After defendant had contracted to build the house C. stated that it was built for defendant and was hers, and so spoke of it to different persons at various times. In an action of ejectment to recover possession of the premises, the court found that the improvements, as well as the payment of the \$1,200, were made and expended on the faith of the promises of C. to give the property to defendant. The court also found that the total amount expended by defendant for permanent improvements, repairs, taxes, insurance, etc., from the beginning of the erection of the house to the time of trial was \$4,734.26, and the fair rental value during that period was \$5,000. *Held*, that defendant was the owner of the equitable title; and so, that the action was not maintainable. *Id.*

7. The defense of usury must be founded on the loan or forbearance of money; if neither of these elements exist in a contract there is no usury, however unconscionable the contract may be. *Meaker v. Fiero.* 165

8. As a general rule a contract to convey land free from incumbrance is not satisfied by the tender of a conveyance, subject to unsatisfied and unpaid mortgages, although they are due and payable and the vendee is permitted to deduct from the purchase money the amount of such liens. *Webster v. K. C. T. Co.* 275

9. An oral promise by one person to indemnify another for becoming a guarantor for a third is not within the Statute of Frauds, and need not be in writing, and the assumption of the responsibility is a sufficient consideration for the promise. *Jones v. Bacon.* 446

—When from parol agreement to convey interest in real estate a trust may be implied in order to prevent fraud, which trust will be unaffected by the Statute of Frauds.
See Goldsmith v. Goldsmith. 813

See BONDS
INSURANCE (LIFE.)
SALES.
SPECIFIC PERFORMANCE.

CORPORATIONS.

1. In an action brought by the attorney-general to vacate the charter of defendant, a domestic corporation, and to annul its corporate existence, these facts appeared: In defendant's charter the object of its organization was stated to be the "buying and selling of milk at wholesale and retail." A large majority of the stockholders were milk dealers in the city of New York, and creamery or milk commission men in that vicinity. At the first meeting of its board of directors a by-law was adopted declaring that said board "shall have the power to make and fix the standard or market price at which milk shall be purchased by the stockholders of the company." Acting under this by-law the board fixed from time to time the price of milk to be paid by dealers. No milk was purchased by defendant, but it did a commission business, selling

milk for farmers to dealers, who would purchase at the price fixed, guaranteeing payment and charging a commission therefor. The prices so fixed largely controlled the market in and about said city. *Held* (PECKHAM, J., dissenting), that the evidence justified a finding that the corporation was a combination inimical to trade and commerce, and so unlawful, and that a judgment granting the relief sought was proper. *People v. Milk Exchange.* 267

2. Where a temporary receiver, appointed in an action to sequester the property of a corporation, has duly executed and filed the requisite bond, and thereafter, under the judgment in the action, is continued as permanent receiver, while a further bond may be exacted in the discretion of the court, he is under no obligation to furnish it until required to do so, and his failure to do so does not affect his power to act as permanent receiver. *Jones v. Blun.* 338

3. Although a partnership may be regarded as a legal entity for certain purposes, this fiction may not be invoked to shield one of the co-partners who is a stockholder in a corporation, from the effect of a statute forbidding a preference to the stockholder, or to enable him to do as a partner that which the law prohibits him from doing as an individual. *Id.*

4. In an action brought by a receiver of the R. & T. M. Co., a manufacturing corporation, to set aside certain transfers alleged to have been made by the corporation to the defendants, one of whom was a stockholder of said corporation, in violation of the statutory provisions (1 R. S. 603, § 4) prohibiting the transfer by a corporation after it has "refused the payment of its notes or other evidences of debt," of any of its property or choses in action to a stockholder, in payment of a debt, the defendants claimed that the judgment of sequestration and the appointment of plaintiff was without jurisdiction and void.

These facts appeared: Plaintiff was appointed receiver in an action brought by a creditor against the corporation to sequester its property. That action was based upon a judgment recovered against the corporation in the City Court of Auburn, which was set forth in the complaint; the corporation did not do business and was not located in that city. *Held*, that the allegations in the complaint in the former action presented the question as to whether the City Court had jurisdiction, and if the court erred in its determination, it was a judicial error to be corrected on appeal therein, and the judgment of sequestration could not be attacked collaterally; and that this was a collateral attack. *Id.*

5. Defendants were co-partners. Defendant B. was a stockholder in said corporation; after it had refused the payment of its evidences of debt, it transferred to defendants' firm, in payment of a debt due to the firm, an indebtedness to it of another corporation. *Held*, that the transfer was within the prohibition of the statute, and so was void; and that plaintiff was entitled to recover the moneys collected by defendants' firm on the claim so transferred. *Id.*

6. In proceedings by certiorari to review the appraisal of the state comptroller fixing the amount of the relator's capital stock employed within this state, the latter objected to the appraisal on the ground that it is a manufacturing company, wholly engaged in carrying on manufacture in this state. These facts appeared: The relator is engaged in the sale of spices, baking powder, coffee and tea, purchasing these articles in bulk. The spices and baking powder are merely put up by it in packages for sale. Various kinds of tea are mixed together, the compound being called and sold as "combination tea." The coffee is purchased in the raw bean, then roasted and ground, and, in some instances different kinds are mixed together. *Held*, that this was not manufacture, and so the relator could not be regarded as a

manufacturing corporation. *People ex rel. v. Roberts* 375

7. Where the officers of a corporation have merely permitted one of its creditors to obtain judgment against it in the regular course of legal proceedings, this is not a transfer or assignment of its property within the meaning of the provision of the "Stock Corporation Act" of 1890 (§ 48, chap. 564, Laws of 1890), which prohibits a corporation, that has refused to pay any of its obligations when due, or any of its officers, from making any such transfer or assignment to any person in contemplation of its insolvency. *French v. Andrews*. 441
8. In proceedings by certiorari to review the action of the state comptroller in assessing so much of the capital of the relator as is employed in this state, it appeared that the relator, a corporation engaged in manufacturing telephone and telegraph apparatus, is an Illinois corporation, having its main office and principal manufactory in that state, but conducting an extensive manufacturing business in this state, and also purchasing and selling general electric supplies not manufactured by it. This it is authorized to do by its charter. *Held*, that the relator was not wholly engaged in carrying on manufacture in this state, and so, was not exempt by the Corporation Tax Act (§ 3, chap. 542, Laws of 1880, as amended by chap. 198, Laws of 1889) from taxation on the amount of its capital employed here. *People ex rel. v. Campbell*. 587

See BANKS AND BANKING.

INSURANCE (FIRE.)

MANUFACTURING CORPORATIONS.

MUNICIPAL CORPORATIONS.

RAILROAD CORPORATIONS.

COUNTY COURTS.

— A County Court has power on motion to make an order correcting an inventory filed by assignor for benefit of creditors so as to conform it to assignment where mistake is shown.

See *Roberts & Co. v. Buckley*. 215

COURTS.

See COUNTY COURTS.
SURROGATES' COURTS.
UNITED STATES COURTS.

CREDITORS' SUIT.

1. A creditor of a domestic banking corporation, seeking to charge a stockholder under the statute, is bound to allege and prove all the facts upon which the liability depends; he must aver the performance of conditions precedent, or set forth facts which in law excuse their performance. *Hirschfeld v. Bopp*. 84
2. To sustain an action brought by a judgment creditor in his own behalf simply, to set aside a conveyance of land made by his debtor, on the ground that it was made in fraud of creditors, plaintiff must show that he has exhausted his remedy at law against the debtor by the issue and return of an execution unsatisfied in whole or in part. *Prentiss v. Bowden*. 342
3. An execution issued after the death of the debtor, without notice to his representatives or permission of the surrogate, will not meet the requirement, as such an execution is prohibited (Code Civ. Pro. § 1379) and is absolutely void. *Id.*
4. The validity of the execution may be assailed in the creditor's suit. *Id.*
5. Where, therefore, in such an action the fact of the death of the debtor before the issuing of the execution was set forth in the answer, and it appeared that the debtor died on the same day, but before the execution was issued, *held*, that it was void; and so, that the action was not maintainable. *Id.*
6. Also *held*, the fact that the defendant, the grantee of the debtor, was appointed his executrix for the purposes of appeal after the return of the execution, and caused herself to be

made a party to the action in which the judgment was rendered, did not affect the question, as prior to her becoming a party the invalidity of the execution was conclusively settled. *Id.*

7. *It seems*, that such an action may be maintained by a judgment creditor in behalf of all the creditors, without the issuing and return of an execution, upon refusal of the representatives of the deceased debtor to bring it. *Id.*
8. The complaint in such an action should set up the refusal and the representative should be made parties defendant. *Id.*

CRIMES.

See MURDER.
RAPE.

CRIMINAL TRIAL.

1. On the trial of an indictment charging defendant with the murder of his wife by administering poison, the defense on cross-examination of a witness for the prosecution sought to show that the witness had aided in the prosecution from revengeful motives; he was asked, among other things, if he had suggested to the coroner "anything about his inquiring about poison." The witness answered: "No." On re-direct examination he was asked and permitted to state what he did say to the coroner. *Held*, no error. *People v. Buchanan*. 1
2. On cross-examination of another witness for the prosecution statements made by him to reporters of his suspicions as to defendant's guilt were brought out. *Held*, that it was proper to show on re-direct examination the reasons of the witness for such statements, and the source of his information on which they were based. *Id.*
3. The prosecution was permitted to show that three days prior to the marriage of defendant and the deceased, she executed a will

- which was given in evidence. By the terms thereof she gave all her estate to her husband (if any) at the time of her death, and in the event of her death unmarried, after some small legacies, she gave her residuary estate to her physician, the defendant. *Held*, that the evidence was properly received. *Id.*
4. A deed of certain real estate executed by the deceased to defendant a few days after their marriage, and a deed of the same premises executed by him, after his indictment, to a third person, were received in evidence. *Held*, no error. *Id.*
 5. M., a friend of the defendant, took him to an attorney. *Held*, that M. was properly permitted to testify to the conversation between defendant and the attorney. *Id.*
 6. It was claimed, on the part of the prosecution, that defendant gave morphine to the deceased. It appeared that a physician called to attend her gave a prescription to be given in doses of one teaspoonful; that an hour later the defendant gave to her two teaspoonfuls of some liquid, and that from indications the taste thereof was bitter. An experienced apothecary was called by the prosecution and permitted to make up the prescription and to testify that the taste thereof was salty. He then mixed four grains of morphine in a teaspoonful of the medicine and described the taste as bitter. *Held*, that the evidence was proper. *Id.*
 7. The prosecution was permitted to prove declarations made by the defendant during his married life, reflecting upon his wife, showing hostile feelings toward and a desire to be rid of her. *Held*, no error. *Id.*
 8. The indictment contained two counts. The first charged that the crime was committed "by giving a deadly poison called morphine;" the second charged its commission by giving "a certain deadly poison to the grand jury unknown." After all the evidence was in, the district attorney, in response to a request by defendant, elected to go to the jury on the second count. A motion was then made by defendant's counsel to strike out all the evidence on the subject of morphine, which was denied. *Held*, no error. *Id.*
 9. After the jury had retired and after they had agreed upon their verdict they were taken to a hotel for dinner. While there P., one of their number, was taken suddenly ill; he became first unconscious and then delirious. A report of the occurrence was made to the court; the physician who attended upon P. was sent for and examined in the presence of the district attorney and defendant's counsel. The physician described what had taken place and gave his opinion that the attack had been caused by mental strain. Later in the day, the juror having improved, was brought in and took his seat with his associates. The court advised them to again retire and confer; this they did and shortly returned with their verdict. *Held*, that the verdict was properly received. *Id.*
 10. A motion was subsequently made for a new trial, one of the grounds being that there had been an illegal separation of the jurors, the affidavits averring that upon the removal of the sick juror the others separated, some going away alone. The affidavits of the jurors and court officers were read in opposition, which were to the effect that no juror was left alone, but that they were all in the charge of officers and that no communication was had by any person with them in respect to the case. *Held*, that a denial of the motion, so far as this ground was concerned, was in the discretion of the court (Code Crim. Pro. § 465, subd. 8); and that the discretion was properly exercised. *Id.*
 11. A second ground for the motion was that the attack from which P. suffered was of such a character that his mind could not have been clear, sound and capable of judgment for some hours before and after, and affidavits of medical ex-

perts were read to that effect, they basing their opinion upon statements of what occurred at the time of the attack. Affidavits of other medical experts who had made a personal examination of the juror were read in opposition; they gave as their opinion that P. was in the full possession of his faculties and that the symptoms of the attack showed simply nervous exhaustion and hysteria; an affidavit of P. and affidavits of his employer and friends showing his mental capacity were also read. *Held*, that the motion was properly denied. *Id.*

— Where request to charge on criminal trial ineffective because too general in its character.
See People v. Wilson (Mem.). 628

DEBTOR AND CREDITOR.

1. A creditor, having an unpaid debt against a decedent, not barred by the Statute of Limitations, is not precluded by a mere omission to present his claim, pursuant to notice, from establishing his debt and demanding an accounting at any time before the executor or administrator is formally discharged from his trust. *In re Mullen*. 98
2. Where, however, an executor, who is also residuary legatee, after having paid all claims under the will and all claims presented in usual course pursuant to the notice, and, acting in good faith, applies to his own use the assets remaining, he can only be held accountable for the actual value of such assets, and may not be charged with the profits of a business in which he has put such assets. *Id.*

See CREDITORS' SUIT.

DEFINITIONS.

1. When in a testamentary gift of personal property the word "heirs" is used, this is to be taken to mean those in the line of distribution, *i. e.*, the next of kin, and where the will shows on its face

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that the person whose heirs are referred to was to the knowledge of the testator living at the time of the execution of the will, the word refers to those who would be the next of kin were the ancestor deceased. *Montignani v. Blads*. 111

2. The words "legal representatives" ordinarily mean executors or administrators, and that meaning will be given them in any instance unless there be facts existing showing that the words were not used in their ordinary sense. *Sutz v. M. R. F. L. Assn.* 568

DEMAND.

Where in an action under the act of 1858 (Chap. 514, Laws of 1858) by an administrator whose intestate died insolvent to disaffirm an alleged transfer of property alleged to have been made by the intestate in fraud of creditors, it appeared that the money in question was paid by a third person to B., defendant's testator, who was the pastor and treasurer of a church, to be used for church purposes in performance of a promise made by said intestate, and that the money was paid by B. upon a mortgage on the church property, the complaint alleged and the answer admitted a demand by plaintiff for the money, but it did not appear that at the time of the demand B. was informed of the facts upon which plaintiff based his claim. *Held*, that the demand was insufficient to charge B. with notice. *Truesdell v. Bourke*. 612

DEVISE.

Where in a will there is a clear and certain devise of a fee, about which the testamentary intention is obvious and without ambiguity, the estate thus given will not be cut down or lessened by subsequent words which are ambiguous or of a doubtful meaning. *Benson v. Corbin*. 851

EQUITY.

1. A parol gift of real estate and a parol promise to convey the same

is valid and enforceable in equity, where the donee has entered into possession of the property and made permanent improvements thereon, on the faith of the donor's promise, and this, although when specific performance by the donee is claimed, the rental value of the property for the time it has been occupied by the latter would be more than the amount expended by him. *Young v. Overbaugh*. 158

2. Where it appears by the complaint in an action in equity that plaintiff is entitled to equitable relief by way of restraining the doing of some act by defendant, the granting of an injunction *pendente lite* is within the reasonable discretion of the trial court, and the exercise of this discretion is not reviewable here. *Castoriano v. Dupe*. 250

3. Where a sale of personal property was induced by fraud on the part of the vendee, and the property has again been sold by the latter, and the proceeds of such sale, in the form of notes or credits, are identified specifically and beyond question in the hands of the latter, or in the possession of his voluntary assignee, a court of equity has power, in the absence of any adequate legal remedy, to reach such proceeds and apply them for the benefit of, and to so far indemnify, the defrauded vendor. *Am. S. R. Co. v. Fancher*. 552

4. In respect to such a remedy an assignee, for the benefit of creditors of the fraudulent vendee, stands in no other or better position than his assignor. *Id.*

5. Where, therefore, in an equitable action brought by a vendor of goods sold on credit to reach the proceeds of sub-sales of the goods, it appeared that the sale was induced by fraudulent representations on the part of the vendees, who were at the time hopelessly insolvent; that the latter sold to various customers, in the ordinary course of business, portions of the goods on credit, and thereafter made an assignment to defendant for the benefit of creditors, when the vendor, for the first time, dis-

covered the fraud; that the claims against the sub-vendees were among the assets that passed by the assignment, and that these claims were collected by the assignee after the assignment and after notice from the plaintiff of rescission of the original sale for the fraud, *held*, that the action was maintainable, and that a judgment against the assignee, directing an accounting and payment by him of the proceeds of such collections, was proper. *Id.*

See CREDITORS' SUIT.

INJUNCTION.

SPECIFIC PERFORMANCE.

EQUITABLE CONVERSION.

1. As a general rule the owner of real estate, from the time of the execution by him of a valid contract for the sale thereof, is to be treated as the owner of the purchase money and the vendee as equitable owner of the land. *Williams v. Haddock*. 144
2. Provisions in such contract making performance on the part of the vendee of his contract to pay a portion of the purchase money and to secure the balance by mortgage on the premises a condition precedent to a conveyance by the vendor do not take the case out of the general rule. *Id.*
4. But prior to a default on the part of the vendee, even where by the contract time is of the essence thereof, there is an equitable conversion within said rule, subject to be reconverted upon the default happening. *Id.*

ESTOPPEL.

1. In an action against the executors of A. to recover a balance unpaid upon a note executed by the firm of W. & Co., of which firm plaintiff claimed that A. was a dormant partner, the complaint alleged that a judgment by confession was entered against the co-partners other than A.; that, pursuant to a compromise agreement, plaintiff executed a release to the

members of the firm who confessed the judgment, other than W. The release recited that said firm was indebted to plaintiff "by virtue of a judgment;" that he had agreed with the members of the firm, other than W., to compromise his "claim on them individually in respect of the said indebtedness." The release then, by its terms, released and discharged the members of the late firm other than W. from all individual liability in respect of the said indebtedness, and further stated that it should operate to release and discharge "all and every person or persons other than" W. of and from all liability "growing out of the indebtedness aforesaid." At the time of the confession of judgment the attorney for the members of the firm who joined in the confession gave the names of the members without mentioning that of A., whom he had no authority to represent; at the time of the execution of the release, which was drawn by said attorney, he was authorized to act for A. *Held*, that defendants were not estopped from claiming that the intended and legal effect should be given to the release; that all that could be claimed was a representation that A. was not a member of the firm, and an estoppel would simply prevent a denial of that assertion. *Harbeck v. Pupin*. 70

2. Also *held*, that plaintiff, while retaining what he had received under the compromise agreement, could not seek to so reform it as to annul it as a contract operative between him and A. *Id.*
3. *It seems*, that one who as a witness has testified to a state of facts in favor of the successful party to an action is not thereby estopped from asserting the contrary in a subsequent action in his own behalf against the party in whose favor he testified or his legal representatives. *Knoch v. Von Bernuth*. 643

EVIDENCE.

1. A witness may be re-examined by the party calling him upon all topics on which he has been cross-

examined; and this, although the cross-examination was as to facts not admissible in evidence. *People v. Buchanan*. 1

2. The protection extended by the statute (Code of Civ. Pro. § 835) to communications between attorney and client does not cover communications made to a friend, or to an attorney in the presence of a friend. *Id.*
3. On the trial of an indictment charging defendant with the murder of his wife by administering poison, the defense on cross-examination of a witness for the prosecution sought to show that the witness had aided in the prosecution from revengeful motives; he was asked, among other things, if he had suggested to the coroner "anything about his inquiring about poison." The witness answered: "No." On re-direct examination he was asked and permitted to state what he did say to the coroner. *Held*, no error. *Id.*
4. On cross-examination of another witness for the prosecution statements made by him to reporters of his suspicions as to defendant's guilt were brought out. *Held*, that it was proper to show on re-direct examination the reasons of the witness for such statements, and the source of his information on which they were based. *Id.*
5. The prosecution was permitted to show that three days prior to the marriage of defendant and the deceased, she executed a will which was given in evidence. By the terms thereof she gave all her estate to her husband (if any) at the time of her death, and in the event of her death unmarried, after some small legacies, she gave her residuary estate to her physician, the defendant. *Held*, that the evidence was properly received. *Id.*
6. A deed of certain real estate executed by the deceased to defendant a few days after their marriage, and a deed of the same premises executed by him, after his indictment, to a third person,

were received in evidence. *Held*, no error. *Id.*

7. M., a friend of the defendant, took him to an attorney. *Held*, that M. was properly permitted to testify to the conversation between defendant and the attorney. *Id.*

8. It was claimed, on the part of the prosecution, that defendant gave morphine to the deceased. It appeared that a physician called to attend her gave a prescription to be given in doses of one teaspoonful; that an hour later the defendant gave to her two teaspoonfuls of some liquid, and that from indications the taste thereof was bitter. An experienced apothecary was called by the prosecution and permitted to make up the prescription and to testify that the taste thereof was salty. He then mixed four grains of morphine in a teaspoonful of the medicine and described the taste as bitter. *Held*, that the evidence was proper. *Id.*

9. The prosecution was permitted to prove declarations made by the defendant during his married life, reflecting upon his wife, showing hostile feelings toward and a desire to be rid of her. *Held*, no error. *Id.*

10. Plaintiffs, whose testator had carried on a manufacturing business, executed a bill of sale to defendants of "the entire manufactured stock * * * on hand at foundry and store rooms" at prices specified. Portions of the property covered by the bill of sale were delivered to and taken possession of by defendants. Another portion was omitted from the inventory taken immediately after the execution of the bill of sale and was delivered to other parties under a claim made by plaintiffs that, at the time of such execution, the articles so omitted had been sold to those parties. In an action to recover the contract prices for the goods delivered, defendants alleged a breach of the contract of sale in the failure to deliver the articles omitted from the inventory, and that this was a condition precedent to a right

of action. Plaintiffs thereupon amended their complaint setting up a waiver of the condition that all the goods were to be delivered. On the trial, plaintiffs were permitted to prove, under objection and exception, that during the negotiation which resulted in the sale it was spoken of and understood between the parties that plaintiffs had sold or agreed to sell a portion of the goods included in the bill of sale, and that these sales were assented to and acquiesced in by defendants; that just prior to the execution of said bill, certain of the goods were piled up and marked as sold to other parties; that, subsequent to the delivery of the bill, defendants assisted in making delivery of some of the goods to the vendees thereof, and that they acquiesced in such sales. Plaintiffs also gave evidence to the effect that the delivery of the goods mentioned in the inventory was received by defendants as a fulfillment of the requirements of the bill, and that they acquiesced in the partial delivery, only claiming damages for the omission to deliver all the goods. *Held*, that the evidence was properly received, and justified a finding of a waiver of full performance of the contract. *Brady v. Cassidy.* 171

11. Defendant drew a check upon a trust company, payable to his own order, which he indorsed "for deposit," and deposited it to his credit in the M. S. Bank; a half hour thereafter the bank closed its doors and never opened again for business. The check was delivered by the officers of the bank to the St. N. Bank, which was then acting as its clearing house agent. The latter bank on the next day presented the check for payment, which was refused, the drawee having been notified by defendant not to pay it. In an action upon the check the answer alleged the insolvency of the M. S. Bank at the time of the receipt by it of the check; that this was known to its officers; that the check was obtained from defendant by fraud, and that the St. N. Bank knew of such insolvency prior to the time of the deposit of

the check by defendant. On the trial defendant offered to prove statements of the officers of the M. S. Bank made the day prior to that of the deposit showing knowledge of its insolvency; this was excluded. *Held*, error; that permitting defendant to make the deposit in reliance upon the supposed solvency of the M. S. Bank, with knowledge on the part of its officers of its insolvency, was a fraud upon him, and this he had a right to establish, and for that purpose the evidence excluded was competent. *Grant v. Walsh*.

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12. The court also excluded evidence tending to show that the officers of the St. N. Bank had knowledge of the insolvency before the time of the deposit. *Held*, error. *Id.*

13. While a former judgment establishing rights and relations between the parties thereto is not admissible to defeat or divest any right existing in a person not a party or a privy, it is admissible against such person for the purpose of proving that the plaintiff in the former action sustained to the defendant the relation established by the judgment, and was clothed with whatever right the defendant had, which was awarded to the defendant by the judgment, saving only the right of the third person to impeach the judgment for fraud or collusion. *R. R. Equipment Co. v. Blair*.

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EXECUTION.

1. To sustain an action brought by a judgment creditor in his own behalf simply, to set aside a conveyance of land made by his debtor, on the ground that it was made in fraud of creditors, plaintiff must show that he has exhausted his remedy at law against the debtor by the issue and return of an execution unsatisfied in whole or in part. *Prentiss v. Bowden*. 342
2. An execution issued after the death of the debtor, without notice to his representatives or permission of the surrogate, will not

meet the requirement, as such an execution is prohibited (Code Civ. Pro. § 1379) and is absolutely void. *Id.*

3. The validity of the execution may be assailed in the creditor's suit. *Id.*

4. Where, therefore, in such an action the fact of the death of the debtor before the issuing of the execution was set forth in the answer, and it appeared that the debtor died on the same day, but before the execution was issued, *held*, that it was void; and so, that the action was not maintainable. *Id.*

5. Also *held*, the fact that the defendant, the grantee of the debtor, was appointed his executrix after the return of the execution for the purposes of appeal, and caused herself to be made a party to the action in which the judgment was rendered, did not affect the question, as prior to her becoming a party the invalidity of the execution was conclusively settled. *Id.*

6. *It seems*, that such an action may be maintained by a judgment creditor in behalf of all the creditors, without the issuing and return of an execution, upon refusal of the representatives of the deceased debtor to bring it. *Id.*

EXECUTOR AND ADMINISTRATOR.

1. A creditor, having an unpaid debt against a decedent, not barred by the Statute of Limitations, is not precluded by a mere omission to present his claim, pursuant to notice, from establishing his debt and demanding an accounting at any time before the executor or administrator is formally discharged from his trust. *In re Mullon*. 98
2. Where, however, an executor, who is also residuary legatee, after having paid all claims under the will and all claims presented in usual course pursuant to the notice, and, acting in good faith, applies to his own use the assets

remaining, he can only be held accountable for the actual value of such assets, and may not be charged with the profits of a business in which he has put such assets. *Id.*

3. While the inventory and appraisal filed by the executor, are not conclusive as to the extent or value of such assets, they are *prima facie* evidence thereof, and the burden is upon the contestant seeking to surcharge the account to show that articles were omitted or that a greater sum was realized than the appraised value. *Id.*

4. M., who had been carrying on the ice business, died leaving a will by which his sons were made residuary legatees. After their father's death the sons took possession of said property and thereafter carried on the ice business as co-partners. The executors named in the will having renounced, the sons were appointed administrators with the will annexed. They filed an inventory of the estate, including therein the ice plant, tools and fixtures formerly used by the testator in said business and the stock on hand. They, pursuant to an order of the surrogate, caused notice for the presentation of claims to be duly published, and paid in full the claims presented, also the specific legacies and funeral expenses. The payments thus made exceeded by more than \$2,000 the whole appraised value of the estate. Five years thereafter the sons sold the business and the property connected therewith. The bill of sale included many articles purchased by the sons after the death of M., existing contracts for the sale of ice, and the stock of ice then on hand, which was on premises leased by them and in which the testator never had any interest. The bill of sale also contained a covenant on the part of the vendors not to engage in the ice business for ten years without the consent of the vendee. In an action for the foreclosure of a mortgage given by M., a deficiency judgment was rendered after the sale so made by the sons, against them as administrators.

Upon an accounting in proceedings instituted by the judgment creditor, the administrators charged themselves with the appraised value of said ice plant, tools and machinery as stated in the inventory. It was not shown that any of the testator's personal property was omitted from the inventory, or that any article therein named was appraised at less than its full value; but the creditor claimed and the surrogate decided that as no accounting was had and the administrators continued the business, using therein the property used by the testator without any formal transfer of title, the business, its profits, accretions and proceeds belonged to the estate, and the administrators were surcharged with the difference between the inventoried value of said property and the sum received by them on the sale. *Held, error. Id.*

5. On March 18, 1886, C., being the owner of certain premises occupied as a brewery in the city of New York, contracted to sell the same for a sum specified. A part of this was paid down, a part was agreed to be paid on or before March 18, 1887, and the balance on that date by a bond secured by mortgage on the premises. The vendor agreed, on receipt of the second payment and of the bond and mortgage, which were to be delivered at a place specified at twelve o'clock noon of the day specified, that she would execute and deliver a deed of the premises. It was agreed that the vendees should, at the same time and place, purchase the materials, fixtures, etc., used in the business at a price, and on conditions to be agreed to in writing between the parties; otherwise that the vendor would be at liberty to refuse to consummate the sale. In case of failure of the vendees to perform at the time specified, it was provided that all their interest in, or right to, a conveyance should "*ipso facto* cease and determine absolutely." It was also provided that the stipulations of the contract should bind the heirs, executors, etc., of the parties. On March 27, 1881, the parties agreed in writing upon

the terms of the purchase of the materials and fixtures. C. died April 22, 1881, leaving a will. The executors duly qualified, and prior to the time specified in the contract for performance they agreed with the vendees to postpone performance until June 1, 1887. On that day the vendees performed and the executors conveyed the premises. In an action brought by the executors to determine, among other things, as to whether the proceeds of sale should be distributed to the next of kin, to the exclusion of one heir not a next of kin, *held*, that there was an equitable conversion of the real estate into personalty at the time of the execution of the contract, and that there was no default; that the executors, acting in good faith, had the right, prior to default, to extend the time of performance; and, therefore, that the next of kin took the avails as personal property to the exclusion of those who were only heirs at law. *Williams v. Haddock*. 144

6. Under the provisions of the Revised Statutes (2 R. S. 88, § 86), providing for the reference of disputed claims against the estate of a deceased person, a claim could only be the subject of an agreement with an executor for a reference which existed as such against the deceased, and was one for which his estate had become answerable, and the executor could not, by offering to refer a claim presented, waive these essential prerequisites of the statute. *In re Van Slooten v. Dodge*. 327

7. An executor cannot subject the estate in his hands for administration to a new liability, either by his contracts or by his wrongful act. *Id.*

8. A claim against the estate of D., deceased, was presented, to the executors under said statutory provisions, for a diamond ring, which the claimant alleged the testator had given to her, and which, at the request of the executor, she had handed to him for inspection, but he refused to re-

turn it, claiming that it belonged to the estate. The claim was disputed by the executor, and, upon his offer to refer, a reference was consented to and ordered, and, upon evidence sustaining the claimant's averments, the referee reported in favor of the claimant, the report was confirmed and judgment entered. *Held*, error; that, as no claim against the deceased was established, no recovery could be had. *Id.*

9. Upon a final settlement of the accounts of executors, these facts appeared: In proceedings taken before the surrogate by legatees to revoke the letters testamentary, a citation was issued, and the executors were enjoined from acting as such until the determination of the surrogate upon the application. The executors resisted the application, and the proceedings resulted in an order revoking the letters unless the executors gave a bond as prescribed by the Code of Civil Procedure (§ 2687, sub. 3), and charging them with the disbursements of the petitioners. The executors complied with the order, continued in the performance of their duties, and on the final accounting claimed a credit for the amounts they alleged they were liable to pay their counsel for services performed while they were so enjoined and for services rendered by their attorney in resisting said application. The surrogate found, upon evidence justifying the findings, that the application was unreasonably resisted, and he disallowed the claim. *Held*, that this was within the discretion of the surrogate and, the General Term having affirmed his decree, this court could not interfere. *In re O'Brien*. 379

10. It is not essential to the validity of a claim against the estate of a deceased person that it be stated with legal precision; it is sufficient if the transaction out of which the claim arises is identified, its general character indicated without technical formality and the amount of the claim stated. *Titus v. Poole*. 414

11. A party presenting such a claim, which is rejected, cannot evade the Statute of Limitations prescribed in such cases (Code Civ. Pro. § 1822) by successive presentations of claims founded on the same transaction, but varying in form or detail. *Id.*
12. Where, therefore, a claim was presented against an estate for an amount stated which was alleged to be due from the decedent in his lifetime on exchange of real estate for which he "fraudulently assigned" to the claimant a worthless certificate of alleged bank stock, which claim was rejected by the executors and thereafter a second claim was presented based on the same transaction, but setting out the representations made by the decedent in regard to the stock as a warranty instead of a fraud, which claim was also rejected, and more than six months after the rejection of the first claim an action was commenced based on a warranty, *held*, that plaintiff by the presentation of the original claim subjected himself to the conditions which attached on its rejection, and the statute commenced to run against any cause of action founded upon the transaction embraced in the claim, whether for deceit or warranty. *Id.*
13. But, *held*, that the provision of the chapter of the Code of Civil Procedure in reference to "limitations of the time of enforcing a civil remedy," which declares that if an action is commenced within the time limited therefor, and * * * the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff * * * may commence a new action for the same cause after the expiration of the time so limited and within one year after such * * * termination," applies to actions against an executor upon a rejected claim against his decedent; and so, as it appeared that an action for fraud based on the original claim was brought within the six months, in which action plaintiff was non-suited, and within one year thereafter the second action was brought, that the case came within the saving provision, and that the action was not barred. *Id.*
14. It appeared that the certificate was of stock in a supposed banking corporation in another state; that P., defendants' testator, stated to plaintiff at the time of the transfer that the bank was a regularly organized bank; that he was one of the original or early stockholders; that the stock was a dividend-paying stock; that it was worth 100 cents on the dollar, and was "good high stock," and that plaintiff thereupon agreed to and did take the stock at its par value. It also appeared that the bank was not incorporated, but was conducted by a partnership, and was at the time of the sale insolvent. *Held*, that the evidence justified a finding that the assertion as to the value and character of the stock was intended to be and was relied upon as a warranty, and for a breach thereof plaintiff was entitled to recover. *Id.*
15. An order of a Surrogate's Court fixing the fees of appraisers of the estate of a deceased testator is a final order affecting a substantial right, and so is appealable to the General Term and to this court. (Code Civ. Pro. §§ 2570, 190.) *In re Harriot.* 540
16. The N. Y. L. I. & T. Co., as executor of the will of H., commenced an action to have its accounts as such settled. The legatees under the will objected to items in the account stated to have been paid the appraisers of the estate for their services; these had not been verified by affidavit of the executor and adjusted by the surrogate before payment as prescribed by the statute then in force. (Chap. 225, Laws of 1873; sec. also, Code Civil Pro. § 2711, as amended in 1893.) Pending the trial of the action before a referee, the executor, upon affidavits of the appraisers and their stipulation as attorneys for the executor, procured an order from the surrogate taxing their fees at \$250 each.

The legatees, under the will, thereupon, upon notice to the executor and appraisers, moved for an order vacating the order taxing said fees, which motion was denied, and the surrogate's order was affirmed by the General Term. *Held*, that the legatees had the right to make the motion, and that the orders below were reviewable here. *Id.*

17. Appraisers are officers of the court, and the amount of their fees being fixed by statute (Code Civ. Pro. § 2565), they have no right to demand or receive more than the statute allows, however large the estate may be, unless the parties interested consent. *Id.*

18. It appeared by the affidavits upon which the motion to vacate was made that the estate, aside from household furniture and items of cash on hand, consisted of twenty-seven different items of corporate stock and other securities; that the counsel for the legatees filled out the inventory, except as to the securities and cash, and this part was prepared by the executor; that the furniture was appraised in a lump sum, and the appraisers had nothing to do in regard thereto save to see that the furniture was in the house; that the value of the securities could have been ascertained in a single day's time. No affidavits were read in opposition. The surrogate, however, took into consideration the affidavits of the appraisers used on the original motion, which, without giving any items, stated generally that each of them had actually and necessarily been employed more than fifty days. The surrogate so found. *Held*, that the facts did not justify the finding, and that the order denying the motion to vacate was error. *Id.*

19. Where administrators of the estate of a deceased person have been duly appointed in this and also in another state where the decedent died, and the foreign administrator has first duly commenced an action upon a policy of insurance upon the life of the decedent found in the latter state

at such death, by the service of process on an agent of the company appointed for that purpose, as prescribed by the laws of that state, a second action upon the policy is not maintainable in the courts of this state by the administrator here. *Sutz v. M. R. F. L. Assn.* 568

20. In such a case the principle of comity between the states requires a refusal upon the part of the courts of this state to entertain jurisdiction. *Id.*

21. The words "legal representatives" ordinarily mean executors or administrators, and that meaning will be given them in any instance unless there be facts existing showing that the words were not used in their ordinary sense. *Id.*

22. *It seems*, the mere fact that a policy of life insurance issued by a company residing in this state was found on the person of one dying in another state, but who, at the time of his death, was a resident of this state, will not preclude the maintenance of an action in the courts of this state upon the policy by an administrator appointed here. *Id.*

23. Defendant issued "a certificate of membership or policy of insurance" to S., payable to his "legal representatives" at the home office of the company in the city of New York. In the application for membership and for a policy, in answer to the requirement to state the name of the beneficiary, the answer was "My estate." At the time of the issuing of the policy S. was in California. He sent the policy to his wife, the plaintiff here, at their residence in Brooklyn. S. thereafter returned to Brooklyn and then went to the state of Washington, taking the policy with him and leaving his wife in Brooklyn. S. notified defendant that he intended to make that state his home; he died there, having the policy in his possession. Letters of administration were issued to his widow in this state. She signed a written renunciation of her right to take out letters in Washington,

and thereupon an administrator was appointed in that state, who commenced an action upon the policy by service of process upon an agent of the company, designated by it, residing in that state and duly authorized under its laws to receive such service. Thereafter this action was commenced by plaintiff as administratrix. *Held*, that the courts of this state ought not to take jurisdiction of the action. *Id.*

24. By defendant's by-laws its object is stated to be "to promote the well-being of all its members and to furnish substantial aid to their families or assigns" in the event of a member's death. S. left no children. *Held*, that plaintiff was not entitled to maintain the action in her own right irrespective of her character as administratrix; that to the words "legal representatives" must be given the ordinary meaning. *Id.*

25. Defendant issued a policy of insurance upon the life of C. The policy stated the consideration therefor to be the payment of a sum specified, by G., a son of C., and that the amount insured was, on the death of C., to be paid to the "assured." In the written application for the policy, which was signed by both C. and G., the latter is described as the applicant and the person for whose benefit the insurance was intended. In an action upon the policy, brought by plaintiff as administrator of C., *held*, that plaintiff, as such administrator, had no interest in the cause of action, and so could not maintain the action. *Cyrenius v. M. L. Ins. Co.* 576

26. Where in an action under the act of 1858 (Chap. 514, Laws of 1858) by an administrator whose intestate died insolvent to disaffirm an alleged transfer of property alleged to have been made by the intestate in fraud of creditors, it appeared that the money in question was paid by a third person to B., defendant's testator, who was pastor and treasurer of a church, to be used for church purposes in performance of a promise made by said intestate, and that the

money was paid by B. upon a mortgage on the church property, the complaint alleged and the answer admitted a demand by plaintiff for the money, but it did not appear that at the time of the demand B. was informed of the facts upon which plaintiff based his claim. *Held*, that the demand was insufficient to charge B. with notice. *Truedell v. Bourke.* 612

FARM CROSSINGS.

After the rendition of a judgment herein requiring defendant forthwith to construct a farm crossing under its road on plaintiffs' lands, defendant leased its road to another railroad company for a long term. By the lease the lessee assumed all claims and suits arising out of, or in any way connected with, the operation of the road. Subsequently, in an action to foreclose a mortgage on the property and franchises of the lessee, a receiver was appointed, who took possession of the property, including the leased road, and continued the operation thereof. Plaintiffs thereupon served a copy of the judgment on the receiver with a demand that he proceed without delay to construct the crossing; this he neglected to do. On motion to compel the performance of the judgment by the receiver, *held*, it was no defense to the application that the receiver had no means with which to comply with the requirements of the judgment; that plaintiffs were entitled to have it executed, and if the bondholders were unwilling to furnish the means, possession of that part of the road passing over plaintiffs' land should be surrendered; and so, that an order was proper directing a compliance with the judgment or a surrender of the premises. *Peckham v. Dutchess Co. R. Co.* 385

FOOD.

1. Adding a foreign and artificial ingredient to a food product, even for the process of color merely, is in effect an adulteration, and the legislature has the power absolutely to prohibit it. *People v. Girard.* 105

2. The provision of the act, "to prevent deceptions in sales of vinegar" (§ 4, chap. 515, Laws of 1889), declaring that "no person shall manufacture, produce, sell or keep for sale any vinegar which shall contain any preparation * * * injurious to health, or any artificial coloring matter," is constitutional. The prohibition against "coloring matter" is for the prevention of fraud; as the coloring of vinegar can only be for the purposes of deception and to defraud the buyer. *Id.*

FORECLOSURE.

1. A mortgagor gave to the mortgagee a promissory note, which when paid it was agreed should operate as a payment on the bond secured by the mortgage. The mortgagee procured the note to be discounted by a bank, and thereafter assigned the securities. In an action to foreclose the mortgage it appeared that the note remained unpaid in the hands of the bank. *Held*, that the transfer of the note operated as a payment *pro tanto* so long as it remained in the hands of a third party and could not be produced and delivered up by the mortgagee; that the bank, however, took no interest in, or right to, the bond and mortgage; and so, was not entitled to have the amount of the note paid to it out of the proceeds of sale, in preference to the claim of the holder of the mortgage for the balance unpaid thereon; but that, the mortgagor having assented thereto, a judgment was proper directing payment of the note out of any surplus arising on the foreclosure sale. *Fitch v. McDowell*. 498

2. In actions by plaintiff as executrix of B. to foreclose two mortgages these facts appeared: B. in his lifetime was the owner of three farms, all of which had been paid for and improved with the aid of the services of his two sons, who had worked for him after their majority. On a settlement between the parties it was agreed that B. was indebted to his sons in the sum of \$5,000, and in con-

sideration thereof he deeded to each of them an undivided one-half of one of the farms. The evidence tended to show and the trial court found that the intention was to vest in the sons the title in the farm, but the father, fearing that the farm might be lost by the sons in speculation, to prevent this, required each of his sons to give him a mortgage for \$1,500 on the farm, which were the mortgages in suit; no bond was given, no actual debt was intended to be secured, and the mortgages were not recorded in B.'s lifetime. *Held*, that there was no consideration for the mortgages; and so, that the actions were not maintainable. *Baird v. Baird*. 659

See MORTGAGE.

FORMER ADJUDICATION.

1. In an action brought to compel specific performance of a contract for the purchase of certain real estate by defendant, situate in the city of Brooklyn, these facts appeared: The premises formerly belonged to a savings bank. In an action brought by the attorney-general in the name of the People to sequester the property of the bank, an order was made without notice to the attorney-general or the depositors, directing the sale of the real estate at public auction, and providing that any of the trustees of the bank might become purchasers at the sale. Plaintiffs, who were such trustees, became the purchasers, received the usual deed and went into possession. After the contract with defendant was executed, an order was made in said action, on motion to the bank and the attorney-general, confirming the sale. Thereafter a depositor applied for leave to intervene in the action, and to have the sale set aside on the ground that the order directing the sale and permitting the trustees to purchase was invalid. The application was heard on the merits "as fully to all intents and purposes as though the order of confirmation * * * had not been made," and the court de-

cided that the proceedings and sale were valid and binding on all the parties interested, which order was affirmed on appeal (188 N. Y. 658). *Held*, that the decision settled the validity of the title, upon the points involved, as to all the world; also that the bank was not a necessary party to that proceeding. *Webster v. K. C. T. Co.*

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2. In an action brought by a receiver of the R. & T. M. Co., a manufacturing corporation, to set aside certain transfers alleged to have been made by the corporation to the defendants, one of whom was a stockholder of said corporation, in violation of the statutory provisions (1 R. S. 603, § 4) prohibiting the transfer by a corporation after it has "refused the payment of its notes or other evidences of debt," of any of its property or choses in action to a stockholder, in payment of a debt, the defendants claimed that the judgment of sequestration and the appointment of plaintiff was without jurisdiction and void. These facts appeared: Plaintiff was appointed receiver in an action brought by a creditor against the corporation to sequester its property. That action was based upon a judgment recovered against the corporation in the City Court of Auburn, which was set forth in the complaint; the corporation did not do business and was not located in that city. *Held*, that the allegations in the complaint in the former action presented the question as to whether the City Court had jurisdiction, and if the court erred in its determination, it was a judicial error to be corrected on appeal therein, and the judgment of sequestration could not be attacked collaterally; and that this was a collateral attack. *Jones v. Blun.*

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3. In an action for the specific performance of a contract between S., plaintiff's testator, and defendant for the purchase by the latter of certain lands to which the former claimed title under a sale by virtue of a judgment in equity of a U. S. Circuit Court, these facts appeared: The action in which

said judgment was rendered was brought by judgment creditors of a partnership to reach the real estate, the title to which was in the name of one or more of the co-partners, but which plaintiff claimed belonged to and was held in trust for the firm. The infant children of G., a deceased member of the firm, were made a party, but were not personally served with process. In the action in which the creditors obtained their judgment an attachment was issued which was levied upon the land in question. The judgment asked in the equity suit was that the land be declared partnership property and that it be sold to pay plaintiff's judgment. A *lis pendens* was filed therein. On petition of the mother of the infants a guardian *ad litem* was appointed and a solicitor appeared for them. Judgment was rendered granting the relief sought. The purchaser on sale in pursuance thereof refused to take the title tendered, and on motion to compel him so to do the court held the title good. *Held*, that the decision, it not appearing that it was contrary to other decisions of the Federal courts, should be followed here; and so, that a judgment in favor of plaintiff was proper. *Sloane v. Martin.*

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4. While a former judgment establishing rights and relations between the parties thereto is not admissible to defeat or divest any right existing in a person not a party or a privy, it is admissible against such person for the purpose of proving that the plaintiff in the former action sustained to the defendant the relation established by the judgment, and was clothed with whatever right the defendant had, which was awarded to the defendant by the judgment, saving only the right of the third person to impeach the judgment for fraud or collusion. *R. R. Equipment Co. v. Blair.*

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FRAUD.

1. The provision of the act, "to prevent deceptions in sales of vinegar" (§ 4, chap. 515, Laws of

1889), declaring that "no person shall manufacture, produce, sell or keep for sale any vinegar which shall contain any preparation * * * injurious to health, or any artificial coloring matter," is constitutional. The prohibition against "coloring matter" is for the prevention of fraud; as the coloring of vinegar can only be for the purposes of deception and to defraud the buyer. *People v. Girard*. 105

2. G., the mother of the parties to this action, was the owner of a house and lot in the city of B., which was incumbered by a mortgage. The children lived with their mother, and the premises furnished a home for the family. In February, 1887, G., having become incapacitated for further care and management of the property, deeded the same to defendant without consideration, in pursuance of a parol agreement and promise on his part that he would hold the same for the benefit of the plaintiffs in common with himself, and would give them their shares in it. The plaintiffs were at that time minors. It was agreed that defendant should have all the accruing rents and his board in the family without charge, he to pay the interest on the mortgage and the taxes on the property. G. died in March thereafter. The agreement was carried out during her life and for some time thereafter. Defendant then sold the property, and with a portion of the avails purchased another house and lot; he was asked to take the deed in the name of all the children, but objected, promising, however, to execute a separate paper acknowledging and securing plaintiffs' rights in the property. Thereafter he repudiated the agreement and claimed to be the sole and absolute owner. In an action to compel performance of the agreement, *held*, that the arrangement was founded upon the relation of mother and son and brothers and sisters, and involved the trust and confidence growing out of these relations; that the denial by defendant of the rights of plaintiffs was a fraud upon them and upon the purpose of the deceased mother; that, con-

ceding no express trust was created, a trust might be implied and properly enforced to prevent and redress the fraud, which trust is unaffected by the Statute of Frauds. *Goldsmith v. Goldsmith*. 818

3. Also, *held*, that although an intended fraud was not explicitly and by the use of that word charged in the complaint, yet, as all the facts showing it were therein fully and clearly stated, the omission was not, after judgment, material. *Id.*
4. One who has been induced to part with his property by the fraud of another, under guise of a contract, may, upon discovery of the fraud, rescind the contract and reclaim the property, unless it has come into the possession of a *bona fide* holder. *Grant v. Walsh*. 502
5. Where the fraud is proved, the burden is upon a third party claiming title to show that he is a *bona fide* holder. *Id.*
6. Defendant drew a check upon a trust company, payable to his own order, which he indorsed "for deposit," and deposited it to his credit in the M. S. Bank; a half hour thereafter the bank closed its doors and never opened again for business. The check was delivered by the officers of the bank to the St. N. Bank, which was then acting as its clearing house agent. The latter bank on the next day presented the check for payment, which was refused, the drawee having been notified by defendant not to pay it. In an action upon the check, the answer alleged the insolvency of the M. S. Bank at the time of the receipt by it of the check; that this was known to its officers; that the check was obtained from defendant by fraud, and that the St. N. Bank knew of such insolvency prior to the time of the deposit of the check by defendant. On the trial defendant offered to prove statements of the officers of the M. S. Bank made the day prior to that of the deposit showing knowledge of its insolvency; this was excluded. *Held*, error; that permitting defendant to make the de-

- posit in reliance upon the supposed solvency of the M. S. Bank, with knowledge on the part of its officers of its insolvency, was a fraud upon him, and this he had a right to establish, and for that purpose the evidence excluded was competent. *Id.*
7. The court also excluded evidence tending to show that the officers of the St. N. Bank had knowledge of the insolvency before the time of the deposit. *Held*, error. *Id.*
8. Where a sale of personal property was induced by fraud on the part of the vendee, and the property has again been sold by the latter, and the proceeds of such sale, in the form of notes or credits, are identified specifically and beyond question in the hands of the latter, or in the possession of his voluntary assignee, a court of equity has power, in the absence of any adequate legal remedy, to reach such proceeds and apply them for the benefit of, and to so far indemnify, the defrauded vendor. *Am. S. R. Co. v. Fancher.* 552
9. In respect to such a remedy an assignee, for the benefit of creditors of the fraudulent vendee, stands in no other or better position than his assignor. *Id.*
10. Where, therefore, in an equitable action brought by a vendor of goods sold on credit to reach the proceeds of such sales of the goods it appeared that the sale was induced by fraudulent representations on the part of the vendees, who were at the time hopelessly insolvent; that the latter sold to various customers, in the ordinary course of business, portions of the goods on credit, and thereafter made an assignment to defendant for the benefit of creditors, when the vendor, for the first time, discovered the fraud; that the claims against the sub-vendees were among the assets that passed by the assignment, and that these claims were collected by the assignee after the assignment and after notice from the plaintiff of rescission of the original sale for the fraud, *held*, that the action was maintainable, and that a judgment against the assignee, directing an accounting and payment by him of the proceeds of such collections, was proper. *Id.*
11. Where fraud is alleged as the basis of an action it must be proved; a recovery may not be had on proof of a right of action on contract, or of some other character, although facts are proved which, in a proper form of action, would justify the recovery. *Truesdell v. Bourke.* 612
12. Where in an action under the act of 1858 (Chap. 514, Laws of 1858) by an administrator whose intestate died insolvent to disaffirm an alleged transfer of property alleged to have been made by the intestate in fraud of creditors, it appeared that the money in question was paid by a third person to B., defendant's testator, who was the pastor and treasurer of a church, to be used for church purposes in performance of a promise made by said intestate, and that the money was paid by B. upon a mortgage on the church property, the complaint alleged and the answer admitted a demand by plaintiff for the money, but it did not appear that at the time of the demand B. was informed of the facts upon which plaintiff based his claim. *Held*, that the demand was insufficient to charge B. with notice. *Id.*

FRAUDS (STATUTE OF).

An oral promise by one person to indemnify another for becoming a guarantor for a third is not within the Statute of Frauds, and need not be in writing, and the assumption of the responsibility is a sufficient consideration for the promise. *Jones v. Bacon.* 446

— When from parol agreement to convey interest in real estate a trust may be implied, in order to prevent fraud, which trust will be unaffected by Statute of Frauds.

See *Goldsmith v. Goldsmith.* 318

GIFT.

A parol gift of real estate and a parol promise to convey the same

is valid and enforceable in equity, where the donee has entered into possession of the property and made permanent improvements thereon, on the faith of the donor's promise, and this, although when specific performance by the donee is claimed, the rental value of the property for the time it has been occupied by the latter would be more than the amount expended by him. *Young v. Overbaugh*. 158

HEALTH.

1. The legislature, in the exercise of its powers to conserve the public health, safety or welfare, may direct that certain improvements or alterations shall be made in existing houses at the owners' expense, and while the requirement must not be unreasonable, either with reference to its nature or cost, yet, when it clearly appears that it tends, in some plain and appreciable manner, to guard and protect the public in the respects specified; that it bears equally upon all members of the same class, and that the costs will not be unreasonable, considering the character of the work required, with reference to the object to be attained, the requirement is constitutional and valid. *Health Dept. v. Rector, etc.* 32

2. It is not requisite to the validity of a legislative enactment of a police nature, which may disturb the enjoyment of individual rights, that provision for compensation for such disturbance be made, where the act does not appropriate private property, but simply regulates its use and enjoyment by the owner. *Id.*

3. The provision of the New York Consolidation Act (§ 663, chap. 410, Laws of 1882, amended by chap. 84, Laws 1887), declaring that tenement houses in the city previously erected shall be furnished by the owners with water, "when they shall be directed so to do by the board of health, in sufficient quantity at one or more places on each floor occupied or intended to be occupied by one or more families," is a proper exercise of the

police power of the state, both as a guard to the public health and as a protection against fire, and is constitutional. (BARTLETT, J., dissenting.) *Id.*

HIGHWAYS.

1. While persons have the right to cross a street on which a street railroad is operated at any place they may select, and are not confined to the street crossing, yet the railroad cars have the preference between the crossings, and although the cars must be managed with care so as not to injure persons in the street, yet pedestrians must use reasonable care to keep out of their way. *Thompson v. Buffalo R. Co.* 196
2. A person passing along a street over a railroad crossing, guarded by gates which are raised, is bound to be vigilant upon that part of the highway the same as upon any other. *Scaggs v. Prest., etc., D. & H. C. Co.* 201
3. While the open gate is an affirmation of safety from the danger of any passing train, this does not dispense with the necessity of vigilance the same as is required of one traveling on a highway where there is no crossing. *Id.*

INFANTS.

1. A minor, although not supposed to possess the judgment, caution and prudence of a person of mature years, is, unless shown not to be *sui juris*, expected and required to exercise the measure of care and caution that is common and usual in one of the same age. *Thompson v. Buffalo R. Co.* 196
2. While persons have the right to cross a street on which a street railroad is operated at any place they may select, and are not confined to the street crossing, yet the railroad cars have the preference between the crossings, and although the cars must be managed with care so as not to injure persons in the street, yet pedestrians must use reasonable care to keep out of their way. *Id.*

3. A., a girl fourteen years of age, was playing with companions in a city street in front of her residence, through which street ran defendant's road, an electric double-track street railway. She started across the street, but stopped until a car running west on the nearest track had passed, and then started to run across in the rear of the car without pausing to see if a car was approaching on the other track. As she reached the other track she was struck and killed by a car going east thereon. In an action to recover damages it appeared that the day before the accident defendant had changed its motor power from horses to electricity, and that the cars were running at a higher rate of speed than sanctioned by the city ordinances. A. was familiar with defendant's tracks, cars and their mode of operation. *Held* (O'BRIEN, J., dissenting), that A. was chargeable with contributory negligence; and so, that the action was not maintainable. *Id.*

4. Plaintiff, a boy ten years of age, who was stealing a ride on one of defendant's street railroad cars, stood, as he testified, upon the step of the front platform, holding to the handles upon the dashboard and on car. The conductor came out upon the platform, with one hand reached out toward plaintiff (he, as a witness, indicating the manner), and cried "hey." Plaintiff, frightened, let go of the handle on the dashboard and fell from the step in such a manner that the wheels of the car passed over one of his legs. In an action to recover damages a motion for a non-suit was denied, and a verdict rendered for plaintiff. *Held*, that it might be assumed, in aid of the judgment, that the act of the conductor was of such a nature as to justify the plaintiff in believing that he was about to receive punishment or bodily harm; and so, that this court could not interfere. *Ansteth v. Buffalo R. Co.* 210

5. Where the jurisdiction of a Federal court is invoked, with reference to real estate in which an infant has an interest, by pro-

ceedings *in rem*, or of that nature, service of process upon the infant is not essential to the attaching of the jurisdiction. *Sloans v. Martin.* 524

INJUNCTION.

1. Where it appears by the complaint in an action in equity that plaintiff is entitled to equitable relief by way of restraining the doing of some act by defendant, the granting of an injunction *pendente lite* is within the reasonable discretion of the trial court, and the exercise of this discretion is not reviewable here. *Castoriano v. Dupe.* 250

2. The complaint in this action alleged the execution by plaintiff of a bill of sale, absolute on its face, of certain embroideries and its delivery to defendant as collateral security for a debt owing to him, the amount of which was to be determined at the date of the transfer, but was not and has not been; that defendant claims to hold the goods as absolute owner, and asserts a liability on plaintiff's part for sums not due or owing; that an accounting is necessary to ascertain the true amount of the debt; that plaintiff is ready and willing to pay whatever sum may be adjudged due from him in order to redeem the goods, and had made a tender of a sum specified, but that defendant refused to accept it, and has advertised the goods for sale at public auction; that the embroideries are peculiar in their character, and their value can only be ascertained by private sales to a narrow range of customers, and they would be sacrificed by a sale at public auction. Judgment was asked that the bill of sale be declared to be collateral; that an accounting be had, and upon payment of the amount found due that the goods be restored to plaintiff; also for an injunction restraining the sale. *Held*, that the complaint set forth a good cause of action; that a remedy at law, *i. e.*, by replevin to recover the goods, was not adequate, as the amount due was in dispute and uncertain; that the court below had power to make

an order granting a temporary injunction; and that such an order was not reviewable here. *Id.*

INSOLVENT CORPORATIONS.

Where the officers of a corporation have merely permitted one of its creditors to obtain judgment against it in the regular course of legal proceedings, this is not a transfer or assignment of its property within the meaning of the provision of the "Stock Corporation Act" of 1890 (§ 48, chap. 564, Laws of 1890), which prohibits a corporation, that has refused to pay any of its obligations when due, or any of its officers, from making any such transfer or assignment to any person in contemplation of its insolvency. *French v. Andrews.* 441

INSURANCE (LIFE.)

1. Where administrators of the estate of a deceased person have been duly appointed in this and also in another state where the decedent died, and the foreign administrator has first duly commenced an action upon a policy of insurance upon the life of the decedent found in the latter state at such death, by the service of process on an agent of the company appointed for that purpose, as prescribed by the laws of that state, a second action upon the policy is not maintainable in the courts of this state by the administrator here. *Sule v. M. R. F. L. Assn.* 563
2. *It seems*, the mere fact that a policy of life insurance issued by a company residing in this state was found on the person of one dying in another state, but who, at the time of his death, was a resident of this state, will not preclude the maintenance of an action in the courts of this state upon the policy by an administrator appointed here. *Id.*
3. Defendant issued "a certificate of membership or policy of insurance" to S., payable to his "legal representatives" at the home office of the company in the city of New York. In the application for membership and for a policy, in answer to the requirement to state the name of the beneficiary, the answer was "My estate." At the time of the issuing of the policy S. was in California. He sent the policy to his wife, the plaintiff here, at their residence in Brooklyn. S. thereafter returned to Brooklyn and then went to the state of Washington, taking the policy with him and leaving his wife in Brooklyn. S. notified defendant that he intended to make that state his home; he died there, having the policy in his possession. Letters of administration were issued to his widow in this state. She signed a written renunciation of her right to take out letters in Washington, and thereupon an administrator was appointed in that state, who commenced an action upon the policy by service of process upon an agent of the company, designated by it, residing in that state and duly authorized under its laws to receive such service. Thereafter this action was commenced by plaintiff as administratrix. *Held*, that the courts of this state ought not to take jurisdiction of the action. *Id.*
4. By defendant's by-laws its object is stated to be "to promote the well-being of all its members and to furnish substantial aid to their families or assigns" in the event of a member's death. S. left no children. *Held*, that plaintiff was not entitled to maintain the action in her own right irrespective of her character as administratrix; that to the words "legal representatives" must be given the ordinary meaning. *Id.*
5. Defendant issued a policy of insurance upon the life of C. The policy stated the consideration therefor to be the payment of a sum specified by G., a son of C., and that the amount insured was on the death of C., to be paid to the "assured." In the written application for the policy, which was signed by both C. and G., the latter is described as the applicant

and the person for whose benefit the insurance was intended. In an action upon the policy, brought by plaintiff as administrator of C., *held*, that plaintiff, as such administrator, had no interest in the cause of action, and so could not maintain the action. *Cyrenius v. M. L. Ins. Co.* 578

JUDGES.

1. The provision of the new Constitution (§ 12, art. 6), providing that the compensation of the judges and justices thereinbefore mentioned "shall not be increased or diminished during their official terms," is not retroactive in its effect; and so, does not affect statutes increasing compensation enacted before the Constitution went into effect. *People ex rel. v. Fitch.* 261
2. The provision of the New York Consolidation Act (§ 1109, chap. 410, Laws of 1882) as amended in 1893 (Chap. 104, Laws of 1893), providing that where a justice of the Supreme Court residing outside of the first judicial district shall be designated as one of the justices of the General Term in the first judicial department, he shall be paid by the city "such sum as shall be certified to be reasonable by the presiding justice" of that department, is a proper and constitutional exercise of legislative power. It is not a provision for compensation for services, but simply a scheme for reimbursing expenses and disbursements; and so, is not invalidated or affected by the provision of the old Constitution (§ 14, art. 6, as amended in 1867), declaring that the compensation of judges and justices therein named for their services shall not be decreased during their official terms; nor does the said statutory provision tend in any way to disturb the policy that seeks to maintain uniformity of salary among judicial officers of the same grade. *Id.*

JUDGMENTS.

As a general rule, when a motion is made to set aside or modify a

judgment founded on matters *in pais* and *dehors* the record, the granting of the relief sought is discretionary. *Hitchcock v. Peaslee.* 547

— When judgment in an action against an insolvent debtor was entered upon an offer of judgment which was in excess of the real indebtedness, and where it appeared that this was through mistake, that the judgment was rendered in good faith to secure an honest debt, *held*, that the court had power to correct the judgment, and that even if not corrected, it was good for the sum actually due.

See Roberts & Co. v. Buckley. 215

— When in action to compel specific performance by vendee, of contract to purchase real estate, the court may, by the judgment, restrain defendant from claiming a breach of plaintiff's covenant to convey free of incumbrances, and direct payment by defendant of mortgage on the land.

See Webster v. K. C. T. Co. 275

— In an action for goods sold, defendant, aside from a general denial, pleaded a counterclaim. The action was tried by the court, and on findings of fact and conclusions of law to the effect that plaintiff had failed to make out a cause of action, the complaint was dismissed and judgment entered for defendant. On motion made by plaintiff the court directed an amendment of the judgment by adding provisions at its foot appointing a referee to take and state the accounts between the parties, striking out said conclusion of law and directing the clerk to amend the judgment record and docket. *Held*, error; that the Special Term had no power to amend the judgment in the particulars stated.

See Duryea v. Fuechsel (Mem.). 653

JURISDICTION.

1. Where the jurisdiction of a Federal court is invoked, with reference to real estate in which an infant has an interest, by proceedings *in rem*, or of that nature, service of process upon the infant is not essential to the attaching of the jurisdiction. *Stoune v. Martin.* 534

2. While in such a case the jurisdiction can only be exercised, upon notice to the parties interested, if they have notice in fact, any irregularity, although it may be reversible error, does not necessarily render the judgment void.

Id.

3. Where administrators of the estate of a deceased person have been duly appointed in this and also in another state where the decedent died, and the foreign administrator has first duly commenced an action upon a policy of insurance upon the life of the decedent found in the latter state at such death, by the service of process on an agent of the company appointed for that purpose, as prescribed by the laws of that state, a second action upon the policy is not maintainable in the courts of this state by the administrator here. *Sulz v. M. R. F. L. Assn.* 563

4. In such a case the principle of comity between the states requires a refusal upon the part of courts of this state to entertain jurisdiction.

Id.

5. *It seems*, the mere fact that a policy of life insurance issued by a company residing in this state was found on the person of one dying in another state, but who, at the time of his death, was a resident of this state, will not preclude the maintenance of an action in the courts of this state upon the policy by an administrator appointed here.

Id.

— *As to jurisdiction of U. S. courts to punish for contempt.*
See Hovey v. Elliott. 126

— *A County Court has power on motion to make an order correcting an inventory filed by assignor for benefit of creditors, so as to conform it to assignment where mistake is shown.*

See Roberts & Co. v. Buckley. 215

— *In an action for goods sold, defendant, aside from a general denial, pleaded a counterclaim. The action was tried by the court, and on findings*

of fact and conclusions of law, to the effect that plaintiff had failed to make out a cause of action, the complaint was dismissed, and judgment entered for defendant. On motion made by plaintiff the court directed an amendment of the judgment by adding provisions at its foot appointing a referee to take and state the accounts between the parties, striking out said conclusions of law and directing the clerk to amend the judgment record and docket. Held, error; that the Special Term had no power to amend the judgment in the particulars stated.

See Duryea v. Fruechsel (Mem.). 654

JURY.

— *Where illness of a juror after jury in a criminal action have retired, will not affect a verdict.*

See People v. Buchanan. 1

JUSTICES OF THE SUPREME COURT.

The provision of the New York Consolidation Act (§ 1109, chap. 410, Laws of 1882), as amended in 1893 (Chap. 104, Laws of 1898), providing that where a justice of the Supreme Court residing outside of the first judicial district shall be designated as one of the justices of the General Term in the first judicial department, he shall be paid by the city "such sum as shall be certified to be reasonable by the presiding justice" of that department, is a proper and constitutional exercise of legislative power. It is not a provision for compensation for services, but simply a scheme for reimbursing expenses and disbursements; and so, is not invalidated or affected by the provision of the old Constitution (§ 14, art. 6, as amended in 1867), declaring that the compensation of judges and justices therein named for their services shall not be decreased during their official terms; nor does the said statutory provision tend in any way to disturb the policy that seeks to maintain uniformity of salary among judicial officers of the same grade. *People ex rel. v. Fitch.* 261

LIENS.

See MECHANICS' LIENS.
MORTGAGES.

LIMITATIONS (STATUTE OF).

1. A payment on a mortgage, made after the death of the mortgagor, by his heirs who have inherited part of the mortgaged premises, to protect their title, does not arrest the running of the Statute of Limitations as against the lien of the mortgage upon another part of said premises which were conveyed by the mortgagor in his lifetime to a third person for full value, who assumed no duty as regards the mortgage, and was under no obligation to pay the mortgage debt. *Murdock v. Waterman*. 55
2. A payment to arrest the running of the statute must be made by a party to or who is bound to pay the obligation, or by one who is in fact or in law his authorized agent. *Id.*
3. *It seems*, that a partial payment by a mortgagor upon the debt secured, made after a conveyance of the mortgaged premises, but before the debt is barred by the statute, continues the lien of the mortgage. *Id.*

MANUFACTURING CORPORATIONS.

1. On September 10, 1891, the J. V. S. Co., a manufacturing corporation, was indebted to defendant in the sum of \$10,976.19; a portion of the indebtedness was represented by notes not then due; the balance was upon account. On that day the defendant surrendered the notes and received for the whole indebtedness ten notes of \$1,000 each, and another for the balance, all payable on demand. These notes were thus given in order that defendant might immediately bring suit on each of them in the Municipal Court of Rochester, wherein judgment could be obtained by default in six days, and the jurisdiction of which is limited to \$1,000. Both the treasurer of the com-

pany, who gave the notes, and defendant knew at the time that the company was unable to pay its debts as they matured. An action was immediately commenced in said court by defendant on each of said notes, and, on September seventeenth, a judgment in each action was taken by default. In an action brought by plaintiff, who was subsequently appointed a receiver of said company, to set aside said judgments, *held*, that the transaction was not a violation of the provision of the "Stock Corporation Act" of 1890 (§ 48, chap. 564, Laws of 1890), which prohibits a corporation, that has refused to pay any of its obligations when due, or any of its officers, from making any such transfer or assignment to any person in contemplation of its insolvency, and so, that the action was not maintainable. (BARTLETT, J., dissenting, so far as the judgments were concerned, which represented the indebtedness not due at the time of the transaction.) *French v. Andrews*. 441

2. In proceedings by certiorari to review the action of the state comptroller in assessing so much of the capital of the relator as is employed in this state, it appeared that the relator, a corporation engaged in manufacturing telephone and telegraph apparatus, is an Illinois corporation, having its main office and principal manufactory in that state, but conducting an extensive manufacturing business in this state, and also purchasing and selling general electric supplies not manufactured by it. This it is authorized to do by its charter. *Held*, that the relator was not wholly engaged in carrying on manufacture in this state; and so, was not exempt by the Corporation Tax Act (§ 3, chap. 542, Laws of 1880, as amended by chap. 193, Laws of 1889) from taxation on the amount of its capital employed here. *People ex rel. v. Campbell*. 587

MASTER AND SERVANT

1. A servant who sustains an injury from the negligence of a superior

agent engaged in the same general business, cannot maintain an action against the common employer, although he was under the control of the agent and could not guard against his negligence. *Keenan v. N. Y., L. E. & W. R. R. Co.* 190

2. Plaintiff, a boy ten years of age, who was stealing a ride on one of defendant's street railroad cars, stood, as he testified, upon the step of the front platform, holding to the handles upon the dashboard and on car. The conductor came out upon the platform, with one hand reached out toward plaintiff (he, as a witness, indicating the manner), and cried "hey." Plaintiff, frightened, let go of the handle on the dashboard and fell from the step in such a manner that the wheels of the car passed over one of his legs. In an action to recover damages a motion for a nonsuit was denied, and a verdict rendered for plaintiff. *Held*, that it might be assumed, in aid of the judgment, that the act of the conductor was of such a nature as to justify the plaintiff in believing that he was about to receive punishment or bodily harm; and so, that this court could not interfere. *Ansteth v. Buffalo R. Co.* 210

8. B., plaintiff's intestate, a fireman upon one of defendant's engines, was killed in consequence of the fall of a bridge on defendant's road. In an action to recover damages these facts appeared: One of the abutments to the bridge, which was built by another railroad corporation, defendant's predecessor, was defective in its original construction. These defects were a foundation upon quicksand, an improper backing of cobble and field stones and the use of poor mortar. None of these defects were visible or capable of detection by ordinary observation. The other abutment had previously developed defects of such a character as to compel its being partially taken down for the purpose of repair. The same defects were discovered in that abutment as were subsequently found to exist in the other. *Held*, that ascertaining defects of construction in

one of the abutments would naturally lead a prudent inspector to doubt the safety of the other, both being built by the same contractor and at the same time, and would impel him at least to make some effort to ascertain the truth beyond merely looking at the structure from the outside, and thus it was a question for the jury whether defendant's duty was fully performed; and that a refusal of the trial court to determine it as matter of law, and a submission thereof to the jury, was not error. *Bogart v. D., L. & W. R. R. Co.* 288

4. In an action to recover damages for alleged negligence causing the death of K., plaintiff's intestate, a car cleaner in defendant's employ, these facts appeared: K. was employed in a yard in which trains were switched off to be cleaned, and which was on the same elevation above the street below as defendant's road. The yard was a new uncompleted structure with seven tracks. The plan was to have the spaces between the tracks covered with plank properly laid down and fastened. The platform of the car was over a space where the planks had not been laid. The hole was uncovered, unguarded and unlighted. While engaged in the performance of his work, K., in attempting to go from the car to a train on another track, in the night time, stepped backward from the step of the platform of the car, fell through the hole into the street below and was killed. Defendant had been using the yard in an incomplete state for three or four weeks, during which time its carpenters had been constantly employed in covering the spaces between the tracks, two gangs being engaged, working from opposite ends of the yard toward the center, and the place where K. fell was in the space left uncovered when the carpenters quit work on that night. K. had been working in the yard during the whole of this time and was familiar with the fact that the spaces between the tracks were not completely covered. *Held*, that plaintiff was not entitled to recover; that defendant had the right to

use the structure and to ask its employees to work therein before it was completely planked over, and if with full knowledge of that fact an employee consented to do his work at that place he assumed the risk consequent thereon, and as the evidence clearly showed such knowledge on the part of K., that a submission of the question to the jury was error. *Kennedy v. Manhattan R. Co.* 288

5. An employer does not undertake with his employee to use the very best appliances, nor is he called upon to discard machinery reasonably suited for his business, although there may be other and safer machinery; at least when the appliances and machinery used by him are in common use in the business; he is simply bound to exercise reasonable care in providing machinery and appliances in view of all the circumstances. *Sisco v. L. & H. R. R. Co.* 296

6. Where a railroad employee is injured through the negligent omission of duty on the part of a co-servant, although it appears that similar omissions by the latter had been habitual for some time prior to the injury, unless the master has actual notice of the omission, or unless the negligence is of such a character as to leave traces or evidences of it in the work itself which could be seen or discovered by reasonable examination, or unless the delinquencies were frequently displayed under the observation of some officer or foreman who represented the corporation and had power to discharge the negligent employee, the law will not imply notice to the company so as to charge it with the negligence under all circumstances simply from the lapse of a certain time since the co-employee began so to neglect his duties. *Cameron v. N. Y. C. & H. R. R. Co.* 400

— *As to liability of employer for injury to employee.*

See Hudson v. R., W. & O. R.

R. Co. 408

Soderman v. Kemp. 427

MECHANICS' LIENS.

1. Under the provision of the Mechanics' Lien Law (Subd. 6, § 24, chap. 342, Laws of 1885) authorizing the owner of premises, against which a lien has been filed, to discharge the lien by executing a bond as specified, "conditioned for the payment of any judgment against the property," a bond so given takes the place of the property and becomes the subject of the lien, the same as moneys paid into court, or securities deposited after suit brought to foreclose the lien. *Morton v. Tucker.* 244
2. The remedy, therefore, to enforce the obligations of the sureties to such a bond is not by an action at law upon the bond, but by an action in equity in which all persons interested, including the sureties on the bond, are made parties, and it is not a condition precedent to the bringing of the action that the lienor shall exhaust his remedy against the landowner by recovering a judgment of foreclosure in form against the property described in the notice of lien. *Id.*
3. The complaint in such an action should be in the usual form of a complaint in an action to foreclose the lien, with the exceptions that it should allege the giving of the bond and the consequent discharge of the lien, and instead of asking judgment for the sale of the premises, it should demand relief against the persons executing the bond for the amount that shall be determined to be payable upon the lien. *Id.*
4. The complaint in such an action alleged that plaintiffs sold at prices agreed upon and delivered to the defendant T., the owner of certain premises described therein, materials specified, to be and which were, used in the erection of buildings thereon, and that no portion thereof had been paid; that a notice of lien in the form prescribed by law was filed within ninety days after the materials were furnished; that T. filed with the clerk a bond duly executed with sureties (who were made defendants) and approved by a justice of the Supreme

Court, which bond was conditioned for the payment of any judgment against the property as required by the statute, and thereupon the lien was discharged by order of the court. On demurrer to the complaint, *held*, that it stated facts sufficient to constitute a cause of action. *Id.*

5. Where, in an action by a sub-contractor to foreclose a mechanic's lien, it appears that plaintiff's cause of action depends upon payments made by the owner of the premises to the contractor before they were due by the terms of the contract, in case the contractor is not made a party an order is proper bringing him in. *Hilton B. C. Co. v. N. Y. C. & H. R. R. Co.* 390

6. In such an action it appeared that the contractor, a corporation, was originally made a party defendant. After service of the summons and complaint on the owners, but before service on the company, it assigned all moneys which should be found due and owing under the contract, as collateral security for an indebtedness; having become insolvent its property went into the hands of a receiver appointed by the court. The order making the appointment contained the usual injunction order enjoining all persons from commencing any action against the corporation. Thereupon plaintiff amended the summons and complaint by striking out the name of the corporation as defendant. The owners in their answers set up the assignment, the appointment of the receiver and alleged that they were proper and necessary parties. *Held*, that an order was properly granted bringing in said parties, so that the rights of all might be determined, and this, notwithstanding the fact that the owners admitted the overpayment and the amount thereof, as such admission would not bind the assignee or the receiver. *Id.*

7. The contract was for the construction of a line of railroad. The contractor engaged to obtain the necessary rights of way; it employed counsel who performed this work, who had in their possession contracts, deeds and other papers upon

which they claimed a lien for their professional services. These counsel, on motion of the owners, were brought in as defendants. *Held*, that said counsel had no lien or claim upon the fund in question, and the bringing them in was not a matter of discretion, but was legal error. *Id.*

MINORS.

See INFANTS.

MORTGAGE.

1. A payment on a mortgage, made after the death of the mortgagor, by his heirs who have inherited part of the mortgaged premises, to protect their title, does not arrest the running of the Statute of Limitations as against the lien of the mortgage upon another part of said premises which were conveyed by the mortgagor in his lifetime to a third person for full value, who assumed no duty as regards the mortgage, and was under no obligation to pay the mortgage debt. *Murdock v. Waterman.* 55

2. A payment to arrest the running of the statute must be made by a party to or who is bound to pay the obligation, or by one who is in fact or in law his authorized agent. *Id.*

3. *It seems*, that a partial payment by a mortgagor upon the debt secured, made after a conveyance of the mortgaged premises, but before the debt is barred by the statute, continues the lien of the mortgage. *Id.*

See FORECLOSURE.

MOTIONS AND ORDERS.

1. A motion was made in a criminal action after verdict for a new trial, one of the grounds being that there had been an illegal separation of the jurors, the affidavits averring that upon the removal of P., a juror who was taken ill while the jury were out, the others separated, some going away alone.

The affidavits of the jurors and court officers were read in opposition, which were to the effect that no juror was left alone, but that they were all in the charge of officers and that no communication was had by any person with them in respect to the case. *Held*, that a denial of the motion, so far as this ground was concerned, was in the discretion of the court (Code Crim. Pro. § 465, subd. 3); and that the discretion was properly exercised. *People v. Buchanan*. 1

2. A second ground for the motion was that the attack from which P. suffered was of such a character that his mind could not have been clear, sound and capable of judgment for some hours before and after, and affidavits of medical experts were read to that effect, they basing their opinion upon statements of what occurred at the time of the attack. Affidavits of other medical experts who had made a personal examination of the juror were read in opposition; they gave as their opinion that P. was in the full possession of his faculties and that the symptoms of the attack showed simply nervous exhaustion and hysteria; an affidavit of P. and affidavits of his employer and friends showing his mental capacity were also read. *Held*, that the motion was properly denied. *Id.*

3. An order of a Surrogate's Court fixing the fees of appraisers of the estate of a deceased testator is a final order affecting a substantial right, and so is appealable to the General Term and to this court. (Code of Civ. Pro. §§ 2570, 190.) *In re Harriot*. 540

4. The N. Y. L. I. & T. Co., as executor of the will of H., commenced an action to have its accounts as such settled. The legatees under the will objected to items in the account stated to have been paid the appraisers of the estate for their services; these had not been verified by affidavit of the executor and adjusted by the surrogate before payment as prescribed by the statute then in force. (Chap. 225, Laws of 1873; see, also, Code Civ. Pro. § 2711,

as amended in 1893.) Pending the trial of the action before a referee, the executor, upon affidavits of the appraisers and their stipulation as attorneys for the executor, procured an order from the surrogate taxing their fees at \$250 each. The legatees, under the will, thereupon, upon notice to the executor and appraisers, moved for an order vacating the order taxing said fees, which motion was denied, and the surrogate's order was affirmed by the General Term. *Held*, that the legatees had the right to make the motion, and that the orders below were reviewable here. *Id.*

5. As a general rule, when a motion is made to set aside or modify a judgment founded on matters *in pais* and *dehors* the record, the granting of the relief sought is discretionary. *Hitchcock v. Peaselee*. 547

— A County Court has power on motion to make an order correcting an inventory filed by assignor for benefit of creditors so as to conform it to assignment where mistake is shown.

See *Roberts & Co. v. Buckley*. 215

— In an action to recover for goods sold, defendant, aside from a general denial, pleaded a counterclaim. The action was tried by the court, and on findings of fact and conclusions of law to the effect that plaintiff had failed to make out a cause of action, the complaint was dismissed and judgment entered for defendant. On motion made by plaintiff the court directed an amendment of the judgment by adding provisions at its foot appointing a referee to take and state the accounts between the parties, striking out said conclusion of law and directing the clerk to amend the judgment record and docket. *Held*, error; that the Special Term had no power to amend the judgment in the particulars stated. See *Duryea v. Fuechsel* (Mem.). 654

MUNICIPAL CORPORATIONS.

1. A city has no power to take and appropriate the natural and permanent banks of a non-navigable stream within the municipality without paying to the owner compensation therefor. *City of Schenectady v. Furman*. 483

2. Plaintiff's common council passed certain resolutions declaring that obstructions and deposits existed in M. creek, a non-navigable stream, not a public highway, running through the lands of F., defendants' testator, within the city limits, which obstructions caused stagnant water to accumulate detrimental to health, etc., and requiring the same to be removed at the expense of the owners or occupants. The resolutions contained a description of the width and depth of the creek, which was declared to be its natural and normal channel and grade, and all matter lying in the creek above such grade and channel to be obstructions and deposits. After the adoption of the resolution F. cleaned out the portion of the creek flowing through his lands to its natural and normal bed and banks. Thereafter plaintiff's superintendent of streets entered, cut down the banks and trees growing thereon, and widened the natural channel. *Held*, that an action was not maintainable to recover the expenses so incurred; that the work done by F. was all that the common council had power to require. *Id.*

See NEW YORK (CITY OF).
SCHENECTADY (CITY OF).

MURDER.

1. On the trial of an indictment charging defendant with the murder of his wife by administering poison, the defense on cross-examination of a witness for the prosecution sought to show that the witness had aided in the prosecution from revengeful motives; he was asked, among other things, if he had suggested to the coroner "anything about his inquiring about poison." The witness answered: "No." On re-direct examination he was asked and permitted to state what he did say to the coroner. *Held*, no error. *People v. Buchanan.* 1

2. On cross-examination of another witness for the prosecution statements made by him to reporters of

his suspicions as to defendant's guilt were brought out. *Held*, that it was proper to show on re-direct examination the reasons of the witness for such statements, and the source of his information on which they were based. *Id.*

3. The prosecution was permitted to show that three days prior to the marriage of defendant and the deceased, she executed a will which was given in evidence. By the terms thereof she gave all her estate to her husband (if any) at the time of her death, and in the event of her death unmarried, after some small legacies, she gave her residuary estate to her physician, the defendant. *Held*, that the evidence was properly received. *Id.*

4. A deed of certain real estate executed by the deceased to defendant a few days after their marriage, and a deed of the same premises executed by him, after his indictment, to a third person, were received in evidence. *Held*, no error. *Id.*

5. M., a friend of the defendant, took him to an attorney. *Held*, that M. was properly permitted to testify to the conversation between defendant and the attorney. *Id.*

6. It was claimed, on the part of the prosecution, that defendant gave morphine to the deceased. It appeared that a physician called to attend her gave a prescription to be given in doses of one teaspoonful; that an hour later the defendant gave to her two teaspoonfuls of some liquid, and that from indications the taste thereof was bitter. An experienced apothecary was called by the prosecution and permitted to make up the prescription and to testify that the taste thereof was salty. He then mixed four grains of morphine in a teaspoonful of the medicine and described the taste as bitter. *Held*, that the evidence was proper. *Id.*

7. The prosecution was permitted to prove declarations made by the defendant during his married life, reflecting upon his wife, showing

hostile feelings toward and a desire to be rid of her. *Held*, no error. *Id.*

8. The indictment contained two counts. The first charged that the crime was committed "by giving a deadly poison called morphine;" the second charged its commission by giving "a certain deadly poison to the grand jury unknown." After all the evidence was in, the district attorney, in response to a request by defendant, elected to go to the jury on the second count. A motion was then made by defendant's counsel to strike out all the evidence on the subject of morphine, which was denied. *Held*, no error.

— As to sufficiency of evidence to justify conviction for murder in the first degree.

See *People v. Wilson* (Mem.). 628

NEGLIGENCE.

1. In an action to recover damages for personal injuries resulting from defendant's negligence, it appeared that about six months after the accident causing the injury plaintiff's eyes began to be affected, he being unable to see clearly. Plaintiff went to a doctor, who told him the trouble was far-sightedness, which the use of glasses would remedy. An expert oculist called by defendant testified that he had examined plaintiff's eyes and that they were wholly uninjured, but far-sighted. The court was asked on behalf of defendant, but refused, to charge that there was no evidence justifying the jury in finding that the condition of plaintiff's eyesight was attributable to the injury. *Held*, error; that the question was one entirely outside of ordinary experience and only capable of being answered by scientific skill, and, as this answer was adverse to plaintiff's claim, there was no question for the jury. *Sumby v. City of Rochester*. 81
2. A servant who sustains an injury from the negligence of a superior agent engaged in the same general business, cannot maintain an action against the common employer, although he was under the control of the agent and could not guard against his negligence. *Keenan v. N. Y., L. E. & W. R. R. Co.* 190
3. In an action to recover damages for alleged negligence causing the death of K., plaintiffs' intestate, it appeared that the latter was a car repairer in defendant's employ. In the repair yard where K. was employed were two tracks exclusively for repairing cars, and another track for cars needing repairs, upon which track cars were shunted at all hours of the day. The repairing tracks were protected by flags when men were at work under the cars, but no such precaution was taken on the third track, as no repairing was done thereon. A large number of men were employed in the yard, who were divided into gangs. K. was engaged in repairing a car on one of the repair tracks; needing a bumper spring, and, not being able to obtain it of one of the employees of defendant, whose duty it was to furnish repairing materials, or to find one in the yard, he reported the fact to T., his gang boss, who directed him to go to said third track and take a spring from a car thereon. While engaged under said car in removing the spring some other cars were backed on the track, moving that under which K. was at work, and he was injured. There was no evidence that it was T.'s duty to furnish materials required by those working under him. *Held*, that defendant was not liable; that T., when he gave the direction, was in no legal sense the representative of defendant, but merely a fellow-servant of K., for whose negligence it was not liable. *Id.*
4. A minor, although not supposed to possess the judgment, caution and prudence of a person of mature years, she, unless shown not to be *sui juris*, is expected and required to exercise the measure of care and caution that is common and usual in one of the same age. *Thompson v. Buffalo R. Co.* 196

5. While persons have the right to cross a street on which a street railroad is operated at any place they may select, and are not confined to the street crossing, yet the railroad cars have the preference between the crossings, and although the cars must be managed with care so as not to injure persons in the street, yet pedestrians must use reasonable care to keep out of their way. *Id.*

6. A., a girl fourteen years of age, was playing with companions in a city street in front of her residence, through which street ran defendant's road, an electric double-track street railway. She started across the street, but stopped until a car running west on the nearest track had passed, and then started to run across in the rear of the car without pausing to see if a car was approaching on the other track. As she reached the other track she was struck and killed by a car going east thereon. In an action to recover damages it appeared that the day before the accident defendant had changed its motor power from horses to electricity, and that the cars were running at a higher rate of speed than sanctioned by the city ordinances. A. was familiar with defendant's tracks, cars and their mode of operation. *Held* (O'BRIEN, J., dissenting), that A. was chargeable with contributory negligence; and so, that the action was not maintainable. *Id.*

7. A person passing along a street over a railroad crossing, guarded by gates which are raised, is bound to be vigilant upon that part of the highway the same as upon any other. *Scaggs v. Prest., etc., D. & H. C. Co.* 201

8. While the open gate is an affirmation of safety from the danger of any passing train, this does not dispense with the necessity of vigilance the same as is required of one traveling on a highway where there is no crossing. *Id.*

9. In an action to recover damages for the death of D., plaintiff's intestate, alleged to have been caused by defendant's negligence,

these facts appeared: Defendant's road crosses a village street at a point near its station. The road at the crossing has five tracks. There are gates at the crossing to prevent entrance upon the tracks when trains are passing. D., plaintiff's intestate, stopped on the street, when the gates were down, waiting to pass when they were raised. A locomotive attached to a train stopping at the depot projected about twelve feet upon the highway; steam was escaping through the automatic or mechanical device for that purpose, making the usual noise. A horse and wagon was on the street, waiting for the gates to be raised; the driver was having much difficulty in controlling the horse. The gate-tender raised the gate sufficiently to allow D. to go through, and after she passed the locomotive raised the gate so that the horse and wagon could pass. D. after passing the locomotive, started to go diagonally across the street; the driver of the horse, finding himself unable to control him, hallooed twice to her; she paid no attention, but walked on, and when between the third and fourth track the horse struck her, causing her death. *Held*, that the evidence failed to show negligence on defendant's part; and so, that plaintiff was properly non-suited. *Id.*

10. In an action to recover damages for the alleged negligent killing of plaintiff's intestate, the case was contested on the ground that there was no negligence on defendant's part, and that there was contributory negligence on the part of the decedent, and at the conclusion of the whole evidence defendant's counsel asked the court to direct a judgment for defendant, but stated no ground therefor, which motion was denied and defendant excepted. A verdict was rendered for plaintiff and an appeal was brought on the sole point that decedent was upon the evidence, as matter of law, chargeable with contributory negligence. *Held*, that the general exception to the denial of the motion was insufficient to present this question, as it was one upon which ad-

ditional proof might have been given by plaintiff had it been specified. *Haines v. N. Y. C. & H. R. R. Co.* 235

11. B., plaintiff's intestate, a fireman upon one of defendant's engines, was killed in consequence of the fall of a bridge on defendant's road. In an action to recover damages these facts appeared: One of the abutments to the bridge, which was built by another railroad corporation, defendant's predecessor, was defective in its original construction. These defects were a foundation upon quicksand, an improper backing of cobble and field stones and the use of poor mortar. None of these defects were visible or capable of detection by ordinary observation. The other abutment had previously developed defects of such a character as to compel its being partially taken down for the purpose of repair. The same defects were discovered in that abutment as were subsequently found to exist in the other. *Held*, that ascertaining defects of construction in one of the abutments would naturally lead a prudent inspector to doubt the safety of the other, both being built by the same contractor and at the same time, and would impel him at least to make some effort to ascertain the truth beyond merely looking at the structure from the outside, and thus it was a question for the jury whether defendant's duty was fully performed; and that a refusal of the trial court to determine it as matter of law, and a submission thereof to the jury, was not error. *Bogart v. D., L. & W. R. R. Co.* 283

12. In an action to recover damages for alleged negligence causing the death of K., plaintiff's intestate, a car cleaner in defendant's employ, these facts appeared: K. was employed in a yard in which trains were switched off to be cleaned, and which was on the same elevation above the street below as defendant's road. The yard was a new uncompleted structure with seven tracks. The plan was to have the spaces between the tracks covered with plank properly laid

down and fastened. The platform of the car was over a space where the planks had not been laid. The hole was uncovered, unguarded and unlighted. While engaged in the performance of his work, K., in attempting to go from the car to a train on another track, in the night time, stepped backward from the step of the platform of the car, fell through the hole into the street below and was killed. Defendant had been using the yard in an incomplete state for three or four weeks, during which time its carpenters had been constantly employed in covering the spaces between the tracks, two gangs being engaged, working from opposite ends of the yard toward the center, and the place where K. fell was in the space left uncovered when the carpenters quit work on that night. K. had been working in the yard during the whole of this time and was familiar with the fact that the spaces between the tracks were not completely covered. *Held*, that plaintiff was not entitled to recover; that defendant had the right to use the structure and to ask its employees to work thereon before it was completely planked over, and if with full knowledge of that fact an employee consented to do his work at that place he assumed the risk consequent thereon, and as the evidence clearly showed such knowledge on the part of K., that a submission of the question to the jury was error. *Kennedy v. Manhattan R. Co.* 283

13. An employer does not undertake with his employee to use the very best appliances, nor is he called upon to discard machinery reasonably suited for his business, although there may be other and safer machinery; at least when the appliances and machinery used by him are in common use in the business; he is simply bound to exercise reasonable care in providing machinery and appliances in view of all the circumstances. *Sisco v. L. & H. R. R. Co.* 296
14. S., plaintiff's intestate, a brakeman in defendant's employ, while climbing up a ladder on the outside of one of the cars of a moving

freight train, for the purpose of setting a brake, came into collision with the stationary arm of a mail crane and was seriously injured. The crane had been erected by the defendant about two months before, pursuant to directions of the U. S. mail authorities. In an action to recover damages, negligence on the part of defendant was claimed in placing the crane too near the tracks. These facts appeared: Defendant had erected two other mail cranes on its road four years before, identical in construction and in relative location to the tracks with the one in question, and these had been in use since that time. Defendant constructed them from plans recommended by the "Railroad Gazette." The same kind of cranes were used on some of the more extensive lines of railroad and were located no further from the tracks. Other railroads used cranes with movable arms, which rose or fell automatically when not kept extended by the weight of mail bags. Evidence was given, which was undisputed, that the cranes with stationary arms were preferable to those with movable arms, as the former permitted greater space between the end of the arm and the sides of passing cars. There was no evidence that the crane in question was placed nearer the track than cranes on other roads, or that it was practicable to place one at a greater distance and have it answer the purpose. *Held*, that there was no evidence authorizing the submission to the jury of the question of negligence in the location of the crane; and so, that such submission was error; that to charge defendant it was not sufficient to show the injury, or that operating the device used involved danger to the brakeman; that G. took the risks of all constructions necessary and reasonably adapted to the business, and it devolved upon plaintiff to show that the appliance was improperly constructed or located. *Id.*

15. Defendant owned a plot of ground in the city of T. on which were railroad tracks and a turntable, built in the usual manner and in good repair, with its

platform elevated above the surface of the ground; the only way to approach it on a level was by means of the tracks. A portion of the premises was unfenced, and the public had for a number of years been accustomed to cross the lot from one street to another. The foot path thus worn ran within fifteen or twenty feet of the turntable. Plaintiff, a child five years and nine months old, went upon said plot, and, in company with other boys, was playing upon the turntable; in turning it around, his leg was caught between the rail on the table and that of a track leading to it, and he was injured. In an action to recover damages it appeared that while turntables might be so fastened when not in use as that people could not turn them, they were not usually so constructed. *Held*, that the facts did not authorize an assumption that the public had been invited to come upon the ground, and while there was an implied license permitting the crossing, one availing himself of it was there by sufferance only, and while defendant owed to him a duty not to injure him either intentionally or by a failure to exercise reasonable care, it owed to him no duty of active vigilance; that the facts did not show a failure to exercise such reasonable care in the management of its business with regard to the turntable, or a violation of any duty defendant owed to plaintiff; that defendant did not owe a duty to the public or the plaintiff to keep the turntable fastened when not in use; and so, that a submission of the question to the jury was error. *Walsh v. Fitchburg R. R. Co.* 301

16. In an action to recover damages for negligence causing the death of plaintiff's intestate, a boy five years of age, it appeared that plaintiff was the father and next of kin of the decedent. The court charged in substance that while the father had no legal claim to the earnings of the son beyond the age of twenty-one years, he could compel the son to support him in his old age, and the jury had the right to consider this fact. Defendant's

counsel thereupon requested the court to charge that the father had no claim on the earnings of the son after maturity, except in case the former becomes poor, unable to support himself and the son is shown to have means. The court declined so to charge. *Held, error. Keenan v. Bklyn. C. R. R. Co.* 348

17. In an action to recover damages for alleged negligence, causing the death of M., plaintiff's intestate, these facts appeared: M. was in the employ of a safe company engaged in moving a safe into defendants' building. The safe was carried up in a freight elevator to a little above the floor where it was to be placed. Other employees of the company placed pieces of iron under the front of the elevator car to sustain it, which was then lowered upon them. Said employees then went into the car, the rear portion of which began to sag down; they called out to raise the car up. The janitor of the building thereupon called down the elevator shaft to the engineer to "raise her a turn." The car was raised up even with the floor, when the janitor again called down the shaft to "stop and hold the pressure on and keep her in her place." Said employees then began to push the safe out of the car; when about half out the car rose, tipping the safe over, and M., who was in front of it, was killed. *Held*, that the complaint was properly dismissed; that defendants were chargeable with no duty with reference to the removal of the safe from the elevator; that the negligence was that of M.'s co-employees in attempting to remove the safe with the power on without notifying the engineer below or directing him to reduce the power in case the car should commence to rise. *Murphy v. Hayes.* 870

18. Where a railroad employee is injured through the negligent omission of duty on the part of a co-servant, although it appears that similar omissions by the latter had been habitual for some time prior to the injury, unless the master has actual notice of the omission, unless the negligence is of such a character as to leave

traces or evidences of it in the work itself which could be seen or discovered by reasonable examination, or unless the delinquencies were frequently displayed under the observation of some officer or foreman who represented the corporation and had power to discharge the negligent employee, the law will not imply notice to the company so as to charge it with the negligence under all circumstances simply from the lapse of a certain time since the co-employee began so to neglect his duties. *Cameron v. N. Y. C. & H. R. R. Co.* 400

19. C., plaintiff's intestate, a brakeman in defendant's employ, was working behind the cars of a freight train standing on a side track. N., a fellow brakeman, working on the same train, had opened the switch and left it unguarded, and in consequence a passing train ran over the switch upon the side track and came into collision with the freight cars, causing C.'s death. In an action to recover damages no negligence on the part of defendant in employing N. was claimed; he had been in its employ about a year. Defendant had promulgated rules for the guidance of its servants, which provided that "whoever opens a switch shall remain at it until it is closed or until he is relieved by some competent employee;" also, that every employee whose duties are prescribed by the rules must have a copy of them on hand and be conversant with every rule, and must report any infringement of them to the head of his department. N. was familiar with and had a copy of the rules; he, as a witness for plaintiff, testified that for about four months prior to the accident he had been accustomed to habitually violate said rule in regard to switches. It was not claimed that any officer or person representing defendant had actual knowledge of these violations, and the officers having charge and power to employ and discharge help certified that they never heard of them and from inspection, observation and report they supposed N. was competent and faithful.

Held, the evidence did not justify a finding that defendant was chargeable with negligence in failing to discover N.'s violation of said rule and in omitting to discharge him; that, under the circumstances, negligence could not be imputed to it simply because for four months it had failed to detect N.'s delinquencies; that it was more reasonable to suppose that C. had knowledge of them and he, having failed to report them, might be regarded as having voluntarily assumed the risks incident thereto. *Id.*

20. In an action to recover damages for alleged negligence causing the death of H., plaintiff's intestate, it appeared that he was a fireman on one of defendant's engines. When the train was stopping at a station to take water for the engine the engineer left it in the charge of H. and went into the depot; shortly thereafter the crown sheet of the engine collapsed and the escaping steam inflicted injuries upon H. causing his death. An examination of the engine showed that the crown sheet had been scorched, and this caused the collapse. Plaintiff claimed that the scorching took place at some previous time, and that defendant was negligent in sending the engine out in an imperfect condition. The engineer testified in substance that on arrival at the station there was about six inches of water over the crown sheet. This was determined by trying the gauge cock. Experts, however, testified that the sheet could not scorch or become red hot while covered with water, and that, in their opinion, from its appearance after the accident, which was described and as to which there was no question, it must have been red hot at the time it collapsed, and there was no evidence that the scorching was done at any other time. *Held*, the evidence did not justify a finding that the scorching took place at a time prior to the starting out of the engine, and so did not justify a verdict for plaintiff. *Hudson v. R., W. & O. R. R. Co.* 408

21. In an action to recover damages for alleged negligence these facts

appeared: The T. S. & I. Co., the original defendant, used cars drawn by a locomotive for the purpose of removing its furnace refuse. Plaintiff, an employee engaged in assisting in this work, was riding on top of the load of a car, when it suddenly dumped, throwing plaintiff on the ground and causing the injury complained of. The car dumped on one side only, and the body when in place was fastened to the truck and held in position by means of two hooks; when these were properly adjusted to the bar upon the truck the car body could not overturn. It was the duty of the employees after the car was dumped to crank it back into place and adjust the hooks. The car had made one previous trip on the morning of the accident. On the previous trip after the car was unloaded it was cranked back and the hooks attached by two other employees. The car with others of a similar pattern had been in daily use for several years. On the return trip after the accident the car was examined by the car repairer, who found nothing the matter with the hooks or the car; it was again put in use without anything having been done to it, and it was in continuous use thereafter. No similar dumping of the car was shown to have occurred either before or after the accident. It was claimed that one of the hooks was slightly straightened toward the point, but it did not appear that its holding power was affected or that the alleged defect had anything to do with the overturning of the car or was of such a nature as to prevent the continued or safe service of the car, or to require any repair. *Held*, that the evidence did not justify a recovery; that the natural inference was the accident was caused by the negligence of plaintiff's co-employees in failing to properly adjust the hooks after the car was dumped on the first trip. *Soderman v. Kemp.* 427

22. The fact that a railroad passenger has taken passage on a train which does not stop at the station where he desires to get off does

not affect the measure of duty of the railroad company or the degree of protection to which he is entitled against the negligent acts of its servants; while on the train the company owes to him the same duty of protection against negligence as to the other passengers. *Lewis v. Prest., etc., D. & H. C. Co.* 508

23. In an action to recover damages for the death of plaintiff's intestate, plaintiff's evidence tended to show these facts: L. was a passenger on one of defendant's trains and desired to get off at a station at which the train did not stop; he was advised by the conductor that no stop was to be made there. Before reaching the station the train slowed up and came almost to a stop near a bridge to enable a freight train, approaching on another track, to pass it, as the tracks were too close together on the bridge to allow two trains to pass. The conductor told L. in substance that he would have to get off there, and, as the train would be moving faster soon, he would have to get off quick. L. went to the rear of the car; to one standing there the freight train was not visible. As L. stepped down from the car it gave a jerk, causing him to lose his balance; he fell upon the other track and was killed by the freight train, the engine of which reached the spot just as he fell. *Held* (FINCH, GRAY and HAIGHT, JJ., dissenting), that the evidence was sufficient to require the submission to the jury of the question as to defendant's negligence, and as to contributory negligence on the part of L.; and so, that a nonsuit was error; that the evidence justified a finding that L. was induced to leave the train in face of a danger, *i. e.*, the approaching freight train, which caused his death, of which he was not aware, but which must have been known to the conductor, and of which he should have advised L. *Id.*

— When trustees not chargeable with such negligence as to make them liable for misappropriation of the trust funds by a co-trustee.

See *Purdy v. Lynch.*

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NEW YORK (CITY OF).

1. The provision of the New York Consolidation Act (§ 663, chap. 410, Laws of 1882, amended by chap. 84, Laws 1887), declaring that tenement houses in the city previously erected shall be furnished by the owners with water, "when they shall be directed so to do by the board of health, in sufficient quantity at one or more places on each floor occupied or intended to be occupied by one or more families," is a proper exercise of the police power of the state, both as a guard to the public health and as a protection against fire, and is constitutional. (BARTLETT, J., dissenting.) *Health Dept. v. Rector, etc.* 32

2. The language of the provision requiring the supply of water to be "in sufficient quantity at one or more places on each floor" does not leave the number of places of supply entirely to the discretion of the board of health; one place on each floor, if it can be made fairly accessible to all the occupants of the floor, is all that can be required. (BARTLETT, J., dissenting.) *Id.*

3. The health department of said city caused to be served on defendant's agent a notice requiring it to provide "suitable appliances to receive and distribute a supply of water for domestic use" on the floors specified of two buildings owned by it, within a time specified. In an action to recover penalties imposed by the act for a failure to comply with said notice, defendant claimed that the houses in question were not tenement houses within the meaning of the act. They were houses constructed many years ago as dwelling houses, each with two stories, an attic and basement, and their internal arrangements had not been altered; one of the houses, however, was occupied by three families, the other, by six. *Held*, that the claim was untenable. *Id.*

4. Defendant offered evidence on the trial as to the necessary cost of complying with the order; also, that the introduction of the ap-

pliances called for with the necessary sinks and waste pipes would cause great danger of injury to the property through the freezing of the water in the pipes in the winter season, and that no complaints in reference to the want of water had been made to defendant by the occupants of the buildings. This evidence was objected to and excluded. *Held*, no error. *Id.*

5. Defendant set up as a defense that the order could not be complied with except by the expenditure of considerable money, and as the order was made without notice its effect was to deprive defendant of its property without a hearing or opportunity to present any defense, and so that it deprived defendant of its property without due process of law. *Held*, untenable. *Id.*

6. Defendant claimed that the statutory provision does not authorize the notice given requiring appliances to furnish "a supply of water for domestic use." *Held*, untenable; that the provision necessarily requires some appliances to supply the water; and that it was within the intent of the provision to provide water for the use of the families occupying the tenement houses, and this necessarily includes a sufficient supply for domestic use. *Id.*

7. Under the provisions of the New York Consolidation Act (§ 307, chap. 410, Laws of 1882), as amended in 1885 (chap. 364, Laws of 1885), which provides that any member of the police force who has performed duty thereon for twenty years or more, "shall, by resolution adopted by a majority vote of the full board, be relieved and dismissed from such force and service and placed on the roll of the police pension fund," the police board is not absolutely bound to pass the prescribed resolution, where, upon application of a member of the force to be retired and placed on the pension roll, it appears that he has served for twenty years; a discretion is vested in the board, not an unlimited and unreviewable discretion, but a judicial one, to be

executed reasonably and fairly. *People ex rel. v. Martin.* 258

8. Where, in proceedings by mandamus to compel said board to pass a resolution granting the application of a member of the police force who had served the prescribed twenty years, to be relieved from the force and placed on the pension roll, it appeared that immediately after the application, and before it had been acted upon, grave charges of misconduct on the part of the applicant as a policeman, were preferred against him, *held*, that the board had the right, before proceeding to act upon the application, to investigate the charges, and if found to be true and of such a nature as to authorize conviction, it would be justified in convicting and dismissing the relator from the force, and the dismissal would be a conclusive reason for denying his application to be placed on the pension roll; that while it was the duty of the board to act with reasonable promptness upon the charges preferred, it must be assumed that they would act in entire good faith; and so, that the application for the mandamus was properly denied. *Id.*

NON-RESIDENTS.

Where a non-resident, who had no property within the state except a sum contributed by her as a special partner to a partnership, was assessed the amount so contributed under the provisions of the act of 1855 (§ 2, chap. 87, Laws of 1855), which provides that non-residents doing business in this state as special partners "shall be assessed and taxed on all sums invested in any manner in said business the same as if they were residents," *held*, that she was not entitled to any deduction on account of the partnership indebtedness. *People ex rel. v. Barker.* 289

NOTARY PUBLIC.

1. A notary public is a public officer within the meaning of the provision of the State Constitution (Art. 13, § 5) prohibiting a "public

officer or a person elected or appointed to a public office under the laws of this state" from receiving from any person or corporation or making use of "any free pass, free transportation," etc. *People v. Rathbone.* 434

2. A notary public who, before the Constitution went into effect, had rightfully received a free pass over a railroad, is, by said provision, prohibited from thereafter using it while he continues to hold the office. *Id.*

3. For a violation of this provision by a notary public, an action by the People is maintainable against him to have his office adjudged to be forfeited. *Id.*

NOTICE.

Where in an action under the act of 1858 (Chap. 514, Laws of 1858) by an administrator whose intestate died insolvent, to disaffirm an alleged transfer of property alleged to have been made by the intestate in fraud of creditors, it appeared that the money in question was paid by a third person to B., defendant's testator, who was the pastor and treasurer of a church, to be used for church purposes in performance of a promise made by said intestate, and that the money was paid by B. upon a mortgage on the church property, the complaint alleged and the answer admitted a demand by plaintiff for the money, but it did not appear that at the time of the demand B. was informed of the facts upon which plaintiff based his claim. *Held*, that the demand was insufficient to charge B. with notice. *Truesdell v. Bourke.* 612

OFFICE AND OFFICERS

1. A notary public is a public officer within the meaning of the provision of the State Constitution (Art. 13, § 5) prohibiting a "public officer or a person elected or appointed to a public office under the laws of this state" from receiving from any person or corporation or making use of "any

free pass, free transportation," etc. *People v. Rathbone.* 434

2. Appraisers are officers of the court, and the amount of their fees being fixed by the statute (Code Civ. Pro. § 2565), they have no right to demand or receive more than the statute allows, however large the estate may be, unless the parties interested consent. *In re Harriot.* 540

PARENT AND CHILD.

In an action to recover damages for negligence causing the death of plaintiff's intestate, a boy five years of age, it appeared that plaintiff was the father and next of kin of the decedent. The court charged in substance that while the father had no legal claim to the earnings of the son beyond the age of twenty-one years, he could compel the son to support him in his old age, and the jury had the right to consider this fact. Defendant's counsel thereupon requested the court to charge that the father had no claim on the earnings of the son after maturity, except in case the former becomes poor, unable to support himself and the son is shown to have means. The court declined so to charge. *Held*, error. *Keenan v. Bklyn. C. R. R. Co.* 348

PARTIES.

1. In an action to foreclose a mechanic's lien it appeared that the contractor, a corporation, was originally made a party defendant. After service of the summons and complaint on the owners, but before service on the company, it assigned all moneys which should be found due and owing under the contract, as collateral security for an indebtedness; having become insolvent its property went into the hands of a receiver appointed by the court. The order making the appointment contained the usual injunction order enjoining all persons from commencing any action against the corporation. Thereupon plaintiff amended the summons and com-

plaint by striking out the name of the corporation as defendant. The owners in their answers set up the assignment, the appointment of the receiver and alleged that they were proper and necessary parties. *Held*, that an order was properly granted bringing in said parties, so that the rights of all might be determined, and this, notwithstanding the fact that the owners admitted the overpayment and the amount thereof, as such admission would not bind the assignee or the receiver. *Hilton B. C. Co. v. N. Y. C. & H. R. R. Co.* 390

2. The contract was for the construction of a line of railroad. The contractor engaged to obtain the necessary rights of way: it employed counsel who performed this work, who had in their possession contracts, deeds and other papers upon which they claimed a lien for their professional services. These counsel, on motion of the owners, were brought in as defendants. *Held*, that said counsel had no lien or claim upon the fund in question, and the bringing them in was not a matter of discretion, but was legal error. *Id.*

3. Defendant issued a policy of insurance upon the life of C. The policy stated the consideration thereof to be the payment of a sum specified, by G., a son of C., and that the amount insured was, on the death of C., to be paid to the "assured." In the written application for the policy, which was signed by both C. and G., the latter is described as the applicant and the person for whose benefit the insurance was intended. In an action upon the policy, brought by plaintiff as administrator of C., *held*, that plaintiff, as such administrator, had no interest in the cause of action, and so could not maintain the action. *Cyrenius v. M. L. Ins. Co.* 576

PARTNERSHIP.

1. In an action against the executors of A. to recover a balance unpaid upon a note executed by the firm

of W. & Co., of which firm plaintiff claimed that A. was a dormant partner, the complaint alleged that a judgment by confession was entered against the co-partners other than A.; that, pursuant to a compromise agreement, plaintiff executed a release to the members of the firm who confessed the judgment, other than W. The release recited that said firm was indebted to plaintiff "by virtue of a judgment;" that he had agreed with the members of the firm, other than W., to compromise his "claim on them individually in respect of the said indebtedness." The release then, by its terms, released and discharged the members of the late firm other than W. from all individual liability in respect of the said indebtedness, and further stated that it should operate to release and discharge "all and every person or persons other than" W. of and from all liability "growing out of the indebtedness aforesaid." *Held*, that the release not only covered and operated upon the judgment, but also the note, and released all persons other than W.; and so that, assuming A. to have been a dormant partner, his liability was covered and he was discharged. *Harbeck v. Pupin.* 70

2. At the time of the confession of judgment, the attorney for the members of the firm who joined in the confession gave the names of the members without mentioning that of A., who had no authority to represent; at the time of the execution of the release, which was drawn by said attorney, he was authorized to act for A. *Held*, that defendants were not estopped from claiming that the intended and legal effect should be given to the release; that all that could be claimed was a representation that A. was not a member of the firm, and an estoppel would simply prevent a denial of that assertion. *Id.*

3. Also *held*, that plaintiff, while retaining what he had received under the compromise agreement, could not seek to so reform it as to annul it as a contract operative between him and A. *Id.*

4. Also *held*, that the principle that where one deals with a known member of a firm so as to discharge him, the release does not operate to set free an unknown and dormant partner, did not apply where, as here, there is an express covenant to release the dormant partner. *Id.*
5. As a special partner is not personally liable for any of the partnership debts, in the assessment of his personal property for the purposes of taxation he is not entitled to a deduction of any portion of the indebtedness of the firm under the provisions of the Revised Statutes (1 R. S. 890, 391, § 9, sub. 4), as amended in 1892 (§ 1, chap. 202, Laws of 1892), which authorizes a deduction of "the just debts owing by him." *People ex rel. v. Barker.* 239
6. Where, therefore, a non-resident, who had no property within the state except a sum contributed by her as a special partner to a partnership, was assessed the amount so contributed under the provision of the act of 1855 (§ 1, chap. 87, Laws of 1855), which provides that non-residents doing business in this state as special partners "shall be assessed and taxed on all sums invested in any manner in said business the same as if they were residents," *held*, that she was not entitled to any deduction on account of the partnership indebtedness. *Id.*
7. Although a partnership may be regarded as a legal entity for certain purposes, this fiction may not be invoked to shield one of the co-partners who is a stockholder in a corporation, from the effect of a statute forbidding a preference to the stockholder, or to enable him to do as a partner that which the law prohibits him from doing as an individual. *Jones v. Blun.* 333
8. In an action brought by a receiver of the R. & T. M. Co., a manufacturing corporation, to set aside certain transfers alleged to have been made by the corporation to the defendants, one of whom was a stockholder of said corporation, in violation of the statutory provisions (1 R. S. 603, § 4) prohibiting the transfer by a corporation after it has "refused the payment of its notes or other evidences of debt," of any of its property or choses in action to a stockholder in payment of a debt, these facts appeared: Defendants were co-partners. Defendant B. was a stockholder in said corporation; after it had refused the payment of its evidences of debt, it transferred to defendants' firm, in payment of a debt due to the firm, an indebtedness to it of another corporation. *Held*, that the transfer was within the prohibition of the statute, and so was void, and that plaintiff was entitled to recover the moneys collected by defendants' firm on the claim so transferred. *Id.*
9. The provision of the Limited Partnership Act (1 R. S. 766, § 13, as amended by chap. 476, Laws of 1862), which requires that the business of such a partnership shall be conducted under a firm name in which the names of the general partners only shall be inserted, but provides that where there are one or more general partners the firm name may consist of one or more with or without the addition of the words "and Company" or "& Co.," does not authorize the use of those words to represent the special partner where there is but one general partner. *Buck v. Alley.* 488
10. The use of those words, however, in such a case does not make the special partner liable as general partner; that penalty, so far as the firm name is concerned, is affixed only where the name of the special partner is used therein with his privacy.

PAYMENT.

1. A payment on a mortgage, made after the death of the mortgagor, by his heirs who have inherited part of the mortgaged premises, to protect their title, does not arrest the running of the Statute of Limitations as against the lien of the mortgage upon another part of said premises which were con-

veyed by the mortgagor in his lifetime to a third person for full value, who assumed no duty as regards the mortgage, and was under no obligation to pay the mortgage debt. *Murdock v. Waterman*. 55

2. A payment to arrest the running of the statute must be made by a party to or who is bound to pay the obligation, or by one who is in fact or in law his authorized agent. *Id.*

3. *It seems*, that a partial payment by a mortgagor upon the debt secured, made after a conveyance of the mortgaged premises, but before the debt is barred by the statute, continues the lien of the mortgage. *Id.*

4. A mortgagor gave to the mortgagee a promissory note, which when paid it was agreed should operate as a payment on the bond secured by the mortgage. The mortgagee procured the note to be discounted by a bank, and thereafter assigned the securities. In an action to foreclose the mortgage it appeared that the note remained unpaid in the hands of the bank. *Held*, that the transfer of the note operated as a payment *pro tanto* so long as it remained in the hands of a third party and could not be produced and delivered up by the mortgagee; that the bank, however, took no interest in, or right to, the bond and mortgage; and so, was not entitled to have the amount of the note paid to it out of the proceeds of sale, in preference to the claim of the holder of the mortgage for the balance unpaid thereon; but that, the mortgagor having assented thereto, a judgment was proper directing payment of the note out of any surplus arising on the foreclosure sale. *Fitch v. McDowell*. 498

PLEADING.

1. A creditor of a domestic banking corporation, seeking to charge a stockholder under the statute, is bound to allege and prove all the facts upon which the liability de-

pends; he must aver the performance of conditions precedent, or set forth facts which in law excuse their performance. *Hirshfeld v. Bopp*. 84

2. The complaint in an action brought under the Banking Law (chap. 689, Laws of 1892), by a creditor of a banking corporation, in his own behalf and that of other creditors, against stockholders, neither averred the recovery of a judgment against the corporation for the debt owing to plaintiff, nor that action has been brought thereupon against it, and there were no proper allegations in the complaint setting forth an excuse for the non-performance of that condition. There was no averment as to the time when the debts owing by the bank were contracted, or that they were payable within two years. *Held*, that a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action was properly sustained. *Id.*

3. Under the provision of the Mechanics' Lien Law (sub. 6, § 24, chap. 342, Laws of 1885) authorizing the owner of premises, against which a lien has been filed, to discharge the lien by executing a bond as specified, "conditioned for the payment of any judgment against the property," a bond so given takes the place of the property and becomes the subject of the lien, and the complaint in an action to enforce the obligations of the sureties to the bond should be in the usual form of a complaint in an action to foreclose the lien, with the exceptions that it should allege the giving of the bond and the consequent discharge of the lien, and instead of asking judgment for the sale of the premises it should demand relief against the persons executing the bond for the amount that shall be determined to be payable upon the lien. *Morton v. Tucker*. 244

4. The complaint in such an action alleged that plaintiffs sold at prices agreed upon and delivered to the defendant T., the owner of certain premises described therein,

materials specified, to be and which were, used in the erection of buildings thereon, and that no portion thereof had been paid; that a notice of lien in the form prescribed by law was filed within ninety days after the materials were furnished; that T. filed with the clerk a bond duly executed with sureties (who were made defendants) and approved by a justice of the Supreme Court, which bond was conditioned for the payment of any judgment against the property as required by the statute, and thereupon the lien was discharged by order of the court. On demurrer to the complaint, *held*, that it stated facts sufficient to constitute a cause of action. *Id.*

5. The complaint in this action alleged the execution by plaintiff of a bill of sale, absolute on its face, of certain embroideries and its delivery to defendant as collateral security for a debt owing to him, the amount of which was to be determined at the date of transfer, but was not and has not been; that defendant claims to hold the goods as absolute owner, and asserts a liability on plaintiff's part for sums not due or owing; that an accounting is necessary to ascertain the true amount of the debt; that plaintiff is ready and willing to pay whatever sum may be adjudged due from him in order to redeem the goods, and had made a tender of a sum specified, but that defendant refused to accept it, and has advertised the goods for sale at public auction; that the embroideries are peculiar in their character, and their value can only be ascertained by private sales to a narrow range of customers, and they would be sacrificed by a sale at public auction. Judgment was asked that the bill of sale be declared to be collateral; that an accounting be had, and upon payment of the amount found due that the goods be restored to plaintiff; also for an injunction restraining the sale. *Held*, that the complaint set forth a good cause of action; that a remedy at law, *i. e.*, by replevin to recover the goods, was not adequate, as the amount due was in dispute and uncertain. *Castoriano v. Dupe.* 250

6. Where fraud is alleged as the basis of an action it must be proved; a recovery may not be had on proof of a right of action on contract, or of some other character, although facts are proved which, in a proper form of action, would justify the recovery. *Truesdell v. Bourke.* 612

— *As to facts necessary to be stated in the complaint in an action brought by a creditor in his own behalf and that of other creditors, to set aside on the ground of fraud a conveyance made by the debtor.*

See Prentiss v. Bowden.

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POLICE.

1. It is not requisite to the validity of a legislative enactment of a police nature, which may disturb the enjoyment of individual rights, that provision for compensation for such disturbance be made, where the act does not appropriate private property, but simply regulates its use and enjoyment by the owner. *Health Dept. v. Rector, etc.* 32
2. The provision of the New York Consolidation Act (§ 663, chap. 410, Laws of 1882, amended by chap. 84, Laws 1887), declaring that tenement houses in the city previously erected shall be furnished by the owners with water, "when they shall be directed so to do by the board of health, in sufficient quantity at one or more places on each floor occupied or intended to be occupied by one or more families," is a proper exercise of the police power of the state, both as a guard to the public health and as a protection against fire, and is constitutional. (BARTLETT, J., dissenting.) *Id.*
3. Under the provisions of the New York Consolidation Act (§ 307, chap. 410, Laws of 1882), as amended in 1885 (chap. 364, Laws of 1885), which provides that any member of the police force who has performed duty thereon for twenty years or more, "shall, by resolution adopted by a majority vote of the full board, be relieved and dismissed from such force and

service and placed on the roll of the police pension fund," the police board is not absolutely bound to pass the prescribed resolution, where, upon application of a member of the force to be retired and placed on the pension roll, it appears that he has served for twenty years; a discretion is vested in the board, not an unlimited and unreviewable discretion, but a judicial one, to be executed reasonably and fairly. *People ex rel. v. Martin.*

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4. Where, in proceedings by mandamus to compel said board to pass a resolution granting the application of a member of the police force who had served the prescribed twenty years, to be relieved from the force and placed on the pension roll, it appeared that immediately after the application, and before it had been acted upon, grave charges of misconduct on the part of the applicant as a policeman, were preferred against him, *held*, that the board had the right, before proceeding to act upon the application, to investigate the charges, and if found to be true and of such a nature as to authorize conviction, it would be justified in convicting and dismissing the relator from the force, and the dismissal would be a conclusive reason for denying his application to be placed on the pension roll; that while it was the duty of the board to act with reasonable promptness upon the charges preferred, it must be assumed that they would act in entire good faith; and so, that the application for the mandamus was properly denied. *Id.*

PRACTICE.

1. A law changing procedure applies thereafter as well to actions pending when the statute was passed as to those subsequently commenced, unless the former are specially excepted. *Lazarus v. Met. El. R. Co.* 581
2. The duty to note in the margin of a proposed statement of facts presented by the attorney of a party to an action tried before him, the manner in which each

proposition was disposed of by him, formerly imposed upon a referee by the Code of Civil Procedure (§ 1023), he was not bound to perform until his decision of the action. *Id.*

2. Where, therefore, after the submission of a case to the referee therein, and after the presentation of proposed findings, but before the decision by the referee, the provision of the Code was repealed (§ 1, chap. 688, Laws of 1894), *held*, that the referee was relieved by the Repealing Act from the performance of said duty; that the right of a party to the action to have the referee pass upon his proposed finding was not saved from the operation of said Repealing Act by the provision of the Statutory Consolidation Act of 1892 (§ 81, chap. 677, Laws of 1892), which declares that the repeal of a statute "shall not affect or impair any act done or right accruing, accrued or acquired * * * prior to the time of such repeal," as no right had accrued at the time of the repeal. *Id.*

See APPEAL.
PLEADING.
TRIAL.

PRESUMPTIONS.

While the rule that a person is presumed to intend the natural and necessary consequences of his acts; and so, where he acts voluntarily, and the act necessarily operates to defraud others, that he intended the fraud, this is not a conclusion presumption, but may be removed by evidence that the act was the result of mistake or inadvertence, and that the intention was innocent. *Roberts & Co. v. Buckley.* 215

PRINCIPAL AND AGENT.

1. A principal is entitled in all cases to re-claim his property intrusted to his agent, or the avails thereof if it has been converted into money, where he can trace the property or its avails, whether in

the hands of the agent, his representative or a third person. *Roca v. Byrne.* 182

2. Where, therefore, the principal is able to trace a remittance of bills of exchange sent to his agent for the purpose of putting the latter in funds to meet expenditures and liabilities incurred by him, and the remittance is in excess of what was needed to discharge the principal's indebtedness in account with the agent, and where the principal is able to distinguish with absolute certainty the moneys deposited in bank as such avails, he is entitled to recover the same; and this, although the avails were deposited to the credit of the agent's private account. *Id.*

3. B, in his lifetime, was the agent in the city of New York for plaintiffs, who were carrying on business in Ecuador. Plaintiffs consigned merchandise to B. for sale, the proceeds being credited to their account. B. purchased goods for plaintiffs, which were paid for out of the avails of such sales, or by bills of exchange drawn on plaintiffs; they also drew bills on B., which he accepted, paid and charged to their account. The accounts were settled semi-annually. B. kept his bank account with defendant, the C. E. Bank, to the credit of which his own moneys as well as those belonging to plaintiffs were deposited. Prior to his death he himself, and, after such death, persons claiming to act for his estate, received from plaintiffs bills of exchange, the avails of which were deposited to said account. B. died insolvent. In an action brought to compel said bank to pay from the balance standing to the credit of B. in said bank account, which balance it appeared was wholly derived from the avails of said bills of exchange, a balance due plaintiffs on their account with B., held, that while as between plaintiffs and B. the relation of debtor and creditor existed according as the accounts showed a balance due to the one or the other, this did not affect the fact that the relation was of a fiduciary character; that the avails of the

bills in excess of what was due B. belonged to plaintiffs, and they had the right in equity to follow them; that the fact that such avails were deposited to the credit of B.'s account did not affect the question as to whom they belonged; and that plaintiffs were entitled to the relief sought. *Id.*

PRIVILEGED COMMUNICATIONS.

The protection extended by the statute (Code of Civ. Pro. § 885) to communications between attorney and client, does not cover communications made to a friend, or to an attorney in the presence of a friend. *People v. Buchanan.* 1

PROMISE.

See CONTRACT.

QUESTIONS OF LAW AND FACT.

— When question of negligence one of fact.

<i>See Saunby v. City of Rochester.</i>	81
<i>Bogart v. D., L. & W. R. R. Co.</i>	283
<i>Lewis v. President, etc., D. & H. C. Co.</i>	508

— When question of negligence one of law.

<i>See Keenan v. N. Y., L. E. & W. R. R. Co.</i>	190
<i>Thompson v. B. R. Co.</i>	196
<i>Scrags v. D. & H. Canal Co.</i>	201
<i>Kennedy v. M. R. Co.</i>	289
<i>Sisco v. L. & H. R. R. Co.</i>	296
<i>Walsh v. F. R. R. Co.</i>	302
<i>Murphy v. Hayes.</i>	370
<i>Cameron v. N. Y. C. & H. R. R. Co.</i>	400
<i>Hudson v. R., W. & O. R. R. Co.</i>	408
<i>Soderman v. Kemp.</i>	437

RAILROAD CORPORATIONS.

1. A., a girl fourteen years of age, was playing with companions in a

city street in front of her residence, through which street ran defendant's road, an electric double-track street railway. She started across the street, but stopped until a car running west on the nearest track had passed, and then started to run across in the rear of the car without pausing to see if a car was approaching on the other track. As she reached the other track she was struck and killed by a car going east thereon. In an action to recover damages it appeared that the day before the accident defendant had changed its motor power from horses to electricity, and that the cars were running at a higher rate of speed than sanctioned by the city ordinances. A. was familiar with defendant's tracks, cars and their mode of operation. *Held* (O'BRIEN, J., dissenting), that A. was chargeable with contributory negligence; and so, that the action was not maintainable. *Thompson v. Buffalo R. Co.* 196

2. A person passing along a street over a railroad crossing, guarded by gates which are raised, is bound to be vigilant upon that part of the highway the same as upon any other. *Scaggs v. Prest., etc., D. & H. C. Co.* 201

3. While the open gate is an affirmation of safety from the danger of any passing train, this does not dispense with the necessity of vigilance the same as is required of one traveling on a highway where there is no crossing. *Id.*

4. In an action to recover damages for the death of D., plaintiff's intestate, alleged to have been caused by defendant's negligence, these facts appeared: Defendant's road crosses a village street at a point near its station. The road at the crossing has five tracks. There are gates at the crossing to prevent entrance upon the tracks when trains are passing. D., plaintiff's intestate, stopped on the street, when the gates were down, waiting to pass when they were raised. A locomotive attached to a train stopping at the depot projected about twelve feet

upon the highway; steam was escaping through the automatic or mechanical device for that purpose, making the usual noise. A horse and wagon was on the street, waiting for the gates to be raised; the driver was having much difficulty in controlling the horse. The gatetender raised the gate sufficiently to allow D. to go through, and after she passed the locomotive raised the gate so that the horse and wagon could pass. D., after passing the locomotive, started to go diagonally across the street; the driver of the horse, finding himself unable to control him, halloed twice to her; she paid no attention, but walked on, and when between the third and fourth track the horse struck her, causing her death. *Held*, that the evidence failed to show negligence on defendant's part; and so, that plaintiff was properly non-suited. *Id.*

5. Plaintiff, a boy ten years of age, who was stealing a ride on one of defendant's street railroad cars, stood, as he testified, upon the step of the front platform, holding to the handles upon the dashboard and on car. The conductor came out upon the platform, with one hand reached out toward plaintiff (he, as a witness, indicating the manner), and cried out "hey." Plaintiff, frightened, let go of the handle on the dashboard and fell from the step in such a manner that the wheels of the car passed over one of his legs. In an action to recover damages a motion for a non-suit was denied, and a verdict rendered for plaintiff. *Held*, that it might be assumed, in aid of the judgment, that the act of the conductor was of such a nature as to justify the plaintiff in believing that he was about to receive punishment or bodily harm; and so, that this court could not interfere. *Ansteth v. Buffalo R. Co.* 210

6. B., plaintiff's intestate, a fireman upon one of defendant's engines, was killed in consequence of the fall of a bridge on defendant's road. In an action to recover damages these facts appeared: One of the abutments to the bridge, which was built by another rail-

road corporation, defendant's predecessor, was defective in its original construction. These defects were a foundation upon quicksand, an improper backing of cobble and field stones and the use of poor mortar. None of these defects were visible or capable of detection by ordinary observation. The other abutment had previously developed defects of such a character as to compel its being partially taken down for the purpose of repair. The same defects were discovered in that abutment as were subsequently found to exist in the other. *Held*, that ascertaining defects of construction in one of the abutments would naturally lead a prudent inspector to doubt the safety of the other, both being built by the same contractor and at the same time, and would impel him at least to make some effort to ascertain the truth beyond merely looking at the structure from the outside, and thus it was a question for the jury whether defendant's duty was fully performed; and that a refusal of the trial court to determine it as matter of law, and a submission thereof to the jury, was not error. *Bogart v. D., L. & W. R. R. Co.* 283

7. In an action to recover damages for alleged negligence causing the death of K., plaintiff's intestate, a car cleaner in defendant's employ, these facts appeared: K. was employed in a yard in which trains were switched off to be cleaned, and which was on the same elevation above the street below as defendant's road. The yard was a new uncompleted structure with seven tracks. The plan was to have the spaces between the tracks covered with plank properly laid down and fastened. The platform of the car was over a space where the planks had not been laid. The hole was uncovered, unguarded and unlighted. While engaged in the performance of his work, K., in attempting to go from the car to a train on another track, in the night time, stepped back from the step of the platform of the car, fell through the hole into the street below and was killed. Defendant had been using the yard in an in-

complete state for three or four weeks, during which time its carpenters had been constantly employed in covering the spaces between the tracks, two gangs being engaged, working from opposite ends of the yard toward the center, and the place where K. fell was in the space left uncovered when the carpenters quit work on that night. K. had been working in the yard during the whole of this time and was familiar with the fact that the spaces between the tracks were not completely covered. *Held*, that plaintiff was not entitled to recover; that defendant had the right to use the structure and to ask its employees to work therein before it was completely planked over, and if with full knowledge of that fact an employee consented to do his work at that place he assumed the risk consequent thereon, and as the evidence clearly showed such knowledge on the part of K., that a submission of the question to the jury was error. *Kennedy v. Manhattan R. Co.* 288

8. S., plaintiff's intestate, a brakeman in defendant's employ, while climbing up a ladder on the outside of one of the cars of a moving freight train, for the purpose of setting a brake, came into collision with the stationary arm of a mail crane and was seriously injured. The crane had been erected by defendant about two months before, pursuant to directions of the U. S. mail authorities. In an action to recover damages, negligence on the part of defendant was claimed in placing the crane too near the tracks. These facts appeared: Defendant had erected two other mail cranes on its road four years before, identical in construction and in relative location to the tracks with the one in question, and these had been in use since that time. Defendant constructed them from plans recommended by the "Railroad Gazette." The same kind of cranes were used on some of the more extensive lines of railroad and were located no further from the tracks. Other railroads used cranes with movable arms, which rose or fell automatically when not kept extended by the weight of

mail bags. Evidence was given, which was undisputed, that the cranes with stationary arms were preferable to those with movable arms, as the former permitted greater space between the end of the arm and the sides of passing cars. There was no evidence that the crane in question was placed nearer the track than cranes on other roads, or that it was practicable to place one at a greater distance and have it answer the purpose. *Held*, that there was no evidence authorizing the submission to the jury of the question of negligence in the location of the crane; and so, that such submission was error; that to charge defendant it was not sufficient to show the injury, or that operating the device used involved danger to the brakeman; that G. took the risks of all constructions necessary and reasonably adapted to the business, and it devolved upon plaintiff to show that the appliance was improperly constructed or located. *Sisco v. L. & H. R. R. Co.* 296

9. Defendant owned a plot of ground in the city of T. on which were railroad tracks and a turntable, built the usual manner and in good repair, with its platform elevated above the surface of the ground; the only way to approach it on a level was by means of the tracks. A portion of the premises were unfenced, and the public had for a number of years been accustomed to cross the lot from one street to another. The foot path thus worn ran within fifteen or twenty feet of the turntable. Plaintiff, a child five years and nine months old, went upon said plot, and, in company with other boys, was playing upon the turntable; in turning it around, his leg was caught between the rail on the table and that of a track leading to it, and he was injured. In an action to recover damages it appeared that while turntables might be so fastened when not in use as that people could not turn them, they were not usually so constructed. *Held*, that the facts did not authorize an assumption that the public had been invited to come upon the ground, and

while there was an implied license permitting the crossing, one availing himself of it was there by sufferance only, and while defendant owed to him a duty not to injure him either intentionally or by a failure to exercise reasonable care, it owed to him no duty of active vigilance; that the facts did not show a failure to exercise such reasonable care in the management of its business with regard to the turntable, or a violation of any duty defendant owed to plaintiff; that defendant did not owe a duty to the public or the plaintiff to keep the turntable fastened when not in use; and so, that a submission of the question to the jury was error. *Walsh v. Fitchburg R. R. Co.* 301

10. In an action to recover damages for negligence causing the death of plaintiffs' intestate, a boy five years of age, it appeared that plaintiff was the father and next of kin of the decedent. The court charged in substance that while the father had no legal claim to the earnings of the son beyond the age of twenty-one years, he could compel the son to support him in his old age, and the jury had the right to consider this fact. Defendant's counsel thereupon requested the court to charge that the father had no claim on the earnings of the son after maturity, except in case the former becomes poor, unable to support himself and the son is shown to have means. The court declined so to charge. *Held*, error. *Keenan v. Bklyn. C. R. R. Co.* 348
11. After the rendition of a judgment herein requiring defendant forthwith to construct a farm crossing under its road on plaintiff's lands, defendant leased its road to another railroad for a long term. By the lease the lessee assumed all claims and suits arising out of, or in any way connected with, the operation of the road. Subsequently, in an action to foreclose a mortgage on the property and franchises of the lessee, a receiver was appointed, who took possession of the property, including the leased road, and continued the operation thereof. Plaintiffs

thereupon served a copy of the judgment on the receiver with a demand that he proceed without delay to construct the crossing; this he neglected to do. On motion to compel the performance of the judgment by the receiver, *held*, it was no defense to the application that the receiver had no means with which to comply with the requirements of the judgment; that plaintiffs were entitled to have it executed, and if the bondholders were unwilling to furnish the means, possession of that part of the road passing over plaintiffs' land should be surrendered; and so, that an order was proper directing a compliance with the judgment or a surrender of the premises. *Peckham v. Dutchess Co. R. R. Co.* 385

12. Where a railroad employee is injured through the negligent omission of duty on the part of a co-servant, although it appears that similar omissions by the latter had been habitual for some time prior to the injury, unless the master has actual notice of the omission, or unless the negligence is of such a character as to leave traces or evidences of it in the work itself which could be seen or discovered by reasonable examination, or unless the delinquencies were frequently displayed under the observation of some officer or foreman who represented the corporation and had power to discharge the negligent employee, the law will not imply notice to the company so as to charge it with the negligence under all circumstances simply from the lapse of a certain time since the co-employee began so to neglect his duties. *Cameron v. N. Y. C. & H. R. R. Co.* 400

13. C., plaintiff's intestate, a brakeman in defendant's employ, was working behind the cars of a freight train standing on a side track. N., a fellow-brakeman, working on the same train, had opened the switch and left it unguarded, and in consequence a passing train ran over the switch upon the side track and came into collision with the freight cars, causing C.'s death. In an action

to recover damages no negligence on the part of defendant in employing N. was claimed; he had been in its employ about a year. Defendant had promulgated rules for the guidance of its servants, which provided that "whoever opens a switch shall remain at it until it is closed or until he is relieved by some competent employee;" also, that every employee whose duties are prescribed by the rules must have a copy of them on hand and be conversant with every rule, and must report any infringement of them to the head of his department. N. was familiar with and had a copy of the rules; he, as a witness for plaintiff, testified that for about four months prior to the accident he had been accustomed to habitually violate said rule in regard to switches. It was not claimed that any officer or person representing defendant had actual knowledge of these violations, and the officers having charge and power to employ and discharge help certified that they never heard of them and from inspection, observation and report they supposed N. was competent and faithful. *Held*, the evidence did not justify a finding that defendant was chargeable with negligence in failing to discover N.'s violation of said rule and in omitting to discharge him; that, under the circumstances, negligence could not be imputed to it simply because for four months it had failed to detect N.'s delinquencies; that it was more reasonable to suppose that C. had knowledge of them and he, having failed to report them, might be regarded as having voluntarily assumed the risks incident thereto. *Id.*

14. In an action to recover damages for alleged negligence causing the death of H., plaintiff's intestate, it appeared that he was a fireman on one of defendant's engines. When the train was stopping at a station to take water for the engine, the engineer left it in the charge of H. and went into the depot; shortly thereafter the crown sheet of the engine collapsed and the escaping steam inflicted injuries upon H. causing his death. An examination of the engine showed

that the crown sheet had been scorched, and this caused the collapse. Plaintiff claimed that the scorching took place at some previous time, and that defendant was negligent in sending the engine out in an imperfect condition. The engineer testified in substance that on arrival at the station there was about six inches of water over the crown sheet. This was determined by trying the gauge cock. Experts, however, testified that the sheet could not scorch or become red hot while covered with water, and that, in their opinion, from its appearance after the accident, which was described and as to which there was no question, it must have been red hot at the time it collapsed, and there was no evidence that the scorching was done at any other time. *Held*, the evidence did not justify a finding that the scorching took place at a time prior to the starting out of the engine, and so did not justify a verdict for plaintiff. *Hudson v. R., W. & O. R. R. Co.* 408

15. A notary public who, before the new Constitution went into effect, had rightfully received a free pass over a railroad, is, by said provision, prohibited from thereafter using it while he continues to hold the office. *People v. Rathbone.* 484

16. The fact that a railroad passenger has taken passage on a train which does not stop at the station where he desires to get off does not affect the measure of duty of the railroad company or the degree of protection to which he is entitled against the negligent acts of its servants; while on the train the company owes to him the same duty of protection against negligence as to the other passengers. *Lewis v. Prest, etc., D. & H. C. Co.* 508

17. In an action to recover damages for the death of plaintiff's intestate, plaintiff's evidence tended to show these facts: L. was a passenger on one of defendant's trains and desired to get off at a station at which the train did not stop; he was advised by the conductor that

no stop was to be made there. Before reaching the station the train slowed up and came almost to a stop near a bridge to enable a freight train, approaching on another track, to pass it, as the tracks were too close together on the bridge to allow two trains to pass. The conductor told L. in substance that he would have to get off there, and, as the train would be moving faster soon, he would have to get off quick. L. went to the rear of the car; to one standing there the freight train was not visible. As L. stepped down from the car it gave a jerk, causing him to lose his balance; he fell upon the other track and was killed by the freight train, the engine on which reached the spot just as he fell. *Held* (FINCH, GRAY and HAIGHT, JJ., dissenting), that the evidence was sufficient to require the submission to the jury of the question as to defendant's negligence, and as to contributory negligence on the part of L.; and so, that a non-suit was error; that the evidence justified a finding that L. was induced to leave the train in face of danger, i. e., the approaching freight train, which caused his death, of which he was not aware, but which must have been known to the conductor, and of which he should have advised L. *Id.*

RAPE.

In an action to recover damages for an assault which, as set forth in the complaint, was committed in such manner and under such circumstances as to constitute the crime of rape, these facts appeared: In April, 1885, defendant took the plaintiff, who was then an orphan fourteen years of age, to his home under an arrangement with her and her relatives, with whom she was then living, that he would board, clothe and educate her; she to become a member of his family, to perform such duties and receive such care and attention as a girl of her age would be entitled to receive from parents in the same condition of life. About a year thereafter, as plaintiff testified, defendant committed an assault upon her in a barn, where

they were alone together, and had connection with her without her consent; that she begged him to let her go, asked him to desist, and resisted him to the best of her ability; that after the outrage he told her to stop crying, go to the house and keep still about it, and if she told any one it would be the worse for her; that on several subsequent occasions within a year thereafter he committed substantially similar assaults, he at each time commanding her never to tell and threatening her if she did, but did not threaten to do her any bodily harm. She made no outcry on any occasion, and it appeared that an outcry, if made, would have been heard by some one. Plaintiff was a slight, nervous girl; defendant a strong, powerful man; and the evidence justified a finding that he exercised a great influence and control over her will. In consequence of the assaults she became ill, having nervous spasms, etc. The action was commenced about three years after the last assault, and not until about the time of its commencement did plaintiff disclose the facts alleged. *Held* (PECKHAM and BARTLETT, JJ., dissenting), that while, in order to maintain the action, it was necessary to satisfy the jury that if defendant had the criminal connection with plaintiff it was accompanied with intent on his part to effect that purpose in defiance of all resistance and without her consent and against her will, and that she resisted to the best of her ability, under all the circumstances, the evidence was sufficient to authorize the submission of these questions to the jury; and so, that with its determination this court could not interfere. *Dean v. Raplee*. 819

RECEIVER.

1. Where a temporary receiver, appointed in an action to sequester the property of a corporation, has duly executed and filed the requisite bond, and thereafter, under the judgment in the action, is continued as permanent receiver, while a further bond may be exacted in the discretion of the court,

he is under no obligation to furnish it until required to do so, and his failure to do so does not affect his power to act as permanent receiver. *Jones v. Blun*. 838

2. After the rendition of a judgment herein requiring defendant forthwith to construct a farm crossing under its road on plaintiff's lands, defendant leased its road to another railroad company for a long term. By the lease the lessee assumed all claims and suits arising out of, or in any way connected with, the operation of the road. Subsequently, in an action to foreclose a mortgage on the property and franchises of the lessee, a receiver was appointed, who took possession of the property, including the leased road, and continued the operation thereof. Plaintiffs thereupon served a copy of the judgment on the receiver with a demand that he proceed without delay to construct the crossing; this he neglected to do. On motion to compel the performance of the judgment by the receiver, *held*, it was no defense to the application that the receiver had no means with which to comply with the requirements of the judgment; that plaintiffs were entitled to have it executed, and if the bondholders were unwilling to furnish the means, possession of that part of the road passing over plaintiffs' land should be surrendered; and so, that an order was proper directing a compliance with the judgment or a surrender of the premises. *Peckham v. Dutchess Co. R. R. Co*. 885

REFERENCE.

1. Under the provisions of the Revised Statutes (2 R. S. 88, § 86), providing for the reference of disputed claims against the estate of a deceased person, a claim could only be the subject of an agreement with an executor for a reference which existed as such against the deceased, and was one for which his estate had become answerable, and the executor could not, by offering to refer a claim presented, waive these

essential prerequisites of the statute. *In re Van Slooten v. Dodge*. 527

2. A claim against the estate of D., deceased, was presented to the executors under said statutory provisions, for a diamond ring, which the claimant alleged the testator had given to her, and which, at the request of the executor, she had handed to him for inspection, but he refused to return it, claiming that it belonged to the estate. The claim was disputed by the executor, and, upon his offer to refer, a reference was consented to and ordered, and, upon evidence sustaining the claimant's averments, the referee reported in favor of the claimant, the report was confirmed and judgment entered. *Held*, error; that, as no claim against the deceased was established, no recovery could be had. *Id.*

8. The duty to note in the margin of a proposed statement of facts presented by the attorney of a party to an action tried before him, the manner in which each proposition was disposed of by him, formerly imposed upon a referee by the Code of Civil Procedure (§ 1023), he was not bound to perform until his decision of the action. *Lazarus v. Met. El. R. Co.* 581

4. Where, therefore, after the submission of a case to the referee therein, and after the presentation of proposed findings, but before the decision by the referee, the provision of the Code was repealed (§ 1, chap. 688, Laws of 1894), *held*, that the referee was relieved by the Repealing Act from the performance of said duty; that the right of a party to the action to have the referee pass upon his proposed finding was not saved from the operation of said Repealing Act by the provision of the Statutory Consolidation Act of 1892 (§ 31, chap. 667, Laws of 1892), which declares that the repeal of a statute "shall not affect or impair any act done or right accruing, accrued or acquired * * * prior to the time of such repeal," as no right had accrued at the time of the repeal. *Id.*

RELEASE.

1. In an action against the executors of A. to recover a balance unpaid upon a note executed by the firm of W. & Co., of which firm plaintiff claimed that A. was a dormant partner, the complaint alleged that a judgment by confession was entered against the co-partners other than A.; that, pursuant to a compromise agreement, plaintiff executed a release to the members of the firm who confessed the judgment, other than W. The release recited that said firm was indebted to plaintiff "by virtue of a judgment;" that he had agreed with the members of the firm, other than W., to compromise his "claim on them individually in respect of the said indebtedness." The release then, by its terms, released and discharged the members of the late firm other than W. from all individual liability in respect of the said indebtedness, and further stated that it should operate to release and discharge "all and every person or persons other than" W. of and from all liability "growing out of the indebtedness aforesaid. *Held*, that the release not only covered and operated upon the judgment, but also the note, and released all persons other than W.; and so that, assuming A. to have been a dormant partner, his liability was covered and he was discharged. *Harbeck v. Pupin.* 70

2. At the time of the confession of judgment the attorney for the members of the firm who joined in the confession gave the names of the members without mentioning that of A., who had no authority to represent; at the time of the execution of the release, which was drawn by said attorney, he was authorized to act for A. *Held*, that defendants were not estopped from claiming that the intended and legal effect should be given to the release; that all that could be claimed was a representation that A. was not a member of the firm, and an estoppel would simply prevent a denial of that assertion. *Id.*

8. Also *held*, that plaintiff, while retaining what he had received un-

der the compromise agreement, could not seek to so reform it as to annul it as a contract operative between him and A. *Id.*

4. Also *held*, that the principle that where one deals with a known member of a firm so as to discharge him, the release does not operate to set free an unknown and dormant partner, did not apply where, as here, there is an express covenant to release the dormant partner. *Id.*

5. In an action upon an alleged oral promise made by McK., defendant's testator, to indemnify plaintiff if he would indorse a note for K., which plaintiff thereupon did, to prove the promise, plaintiff called K. as a witness, and, in order to make him competent, executed to him a release from all liability because of said indorsement. *Held*, that by the release McK. was discharged from all liability to plaintiff, as on restoring to the latter the sum paid by him in discharge of his liability as indorser, McK. would have been entitled to the right which plaintiff had against K., and this was cut off by the release. *Jones v. Bacon.* 446

REMAINDERS.

H. by his will gave to his wife the use of his dwelling house until his farm should be sold. It directed a sale of the farm as soon after his decease as it could be done without undue sacrifice, and a reservation out of the proceeds of the sale of \$4,000 for the use of his wife during life, the same after her decease to be divided among his three children. The testator then gave to his children, within one year after the aforesaid sale of real estate and the reservation for the use of the wife, the whole of the balance of his property. Debts owing by the children were referred to as a part of their inheritance. One of the children died during the lifetime of the widow. In an action for the construction of the will, *held*, that the intent of the testator was to give to the children all of his estate except that given to the wife, and so it

covered the trust fund as a remainder; that at his death the title vested in the three children, and the share of the one who died passed upon her death to her representatives. *In re Young.* 535

REMEDIES.

1. The remedy to enforce the obligations of the sureties to a bond, given under the Mechanics' Lien Law (sub. 6, § 24, chap. 542, Laws of 1885), is not by an action of law upon the bond, but by an action in equity in which all persons interested, including the sureties on the bond, are made parties, and it is not a condition precedent to the bringing of the action that the lienor shall exhaust his remedy against the landowner by recovering a judgment of foreclosure in form against the property described in the notice of lien. *Morton v. Tucker.* 244
2. The complaint in such an action should be in the usual form of a complaint in an action to foreclose the lien, with the exceptions that it should allege the giving of the bond and the consequent discharge of the lien, and instead of asking judgment for the sale of the premises it should demand relief against the persons executing the bond for the amount that shall be determined to be payable upon the lien. *Id.*
3. One who has been induced to part with his property by the fraud of another, under guise of a contract, may, upon discovery of the fraud, rescind the contract and reclaim the property unless it has come into the possession of a *bona fide* holder. *Grant v. Walsh.* 503
4. Where a sale of personal property was induced by fraud on the part of the vendee, and the property has again been sold by the latter, and the proceeds of such sale, in the form of notes or credits, are identified specifically and beyond question in the hands of the latter, or in the possession of his voluntary assignee, a court of equity has power, in the absence of any adequate legal remedy, to reach such

proceeds and apply them for the benefit of, and to so far indemnify, the defrauded vendor. *Am. S. R. Co. v. Fancher.* 552

8. In respect to such a remedy an assignee, for the benefit of creditors of the fraudulent vendee, stands in no other or better position than his assignor. *Id.*

SALES.

1. Plaintiffs, whose testator had carried on a manufacturing business, executed a bill of sale to defendants of "the entire manufactured stock * * * on hand at foundry and store rooms" at prices specified. Portions of the property covered by the bill of sale were delivered to and taken possession of by defendants. Another portion was omitted from the inventory taken immediately after the execution of the bill of sale and was delivered to other parties under a claim made by plaintiffs that, at the time of such execution, the articles so omitted had been sold to those parties. In an action to recover the contract prices for the goods delivered, defendants alleged a breach of the contract of sale in the failure to deliver the articles omitted from the inventory, and that this was a condition precedent to a right of action. Plaintiffs thereupon amended their complaint setting up a waiver of the condition that all the goods were to be delivered. On the trial, plaintiffs were permitted to prove, under objection and exception, that during the negotiation which resulted in the sale it was spoken of and understood between the parties that plaintiffs had sold or agreed to sell a portion of the goods included in the bill of sale, and that these sales were assented to and acquiesced in by defendants; that just prior to the execution of said bill, certain of the goods were piled up and marked as sold to other parties; that subsequent to the delivery of the bill, defendants assisted in making delivery of some of the goods to the vendees thereof, and that they acquiesced in such sales. Plaintiffs also gave evidence to the

effect that the delivery of the goods mentioned in the inventory was received by defendants as a fulfillment of the requirements of the bill, and that they acquiesced in the partial delivery, only claiming damages for the omission to deliver all the goods. *Held*, that the evidence was properly received, and justified a finding of a waiver of full performance of the contract; and that plaintiffs were entitled to recover the contract prices for the goods delivered, deducting defendants' damages resulting from a failure to deliver the balance. *Brady v. Cassidy.* 171

2. Where a sale of personal property was induced by fraud on the part of the vendee, and the property has again been sold by the latter, and the proceeds of such sale, in the form of notes or credits, are identified specifically and beyond question in the hands of the latter, or in the possession of his voluntary assignee, a court of equity has power, in the absence of any adequate legal remedy, to reach such proceeds and apply them for the benefit of, and to so far indemnify, the defrauded vendor. *Am. S. R. Co. v. Fancher.* 552
3. In respect to such a remedy an assignee, for the benefit of creditors of the fraudulent vendee, stands in no other or better position than his assignor. *Id.*
4. Where, therefore, in an equitable action brought by a vendor of goods sold on credit to reach the proceeds of such sales of the goods it appeared that the sale was induced by fraudulent representations on the part of the vendees, who were at the time hopelessly insolvent; that the latter sold to various customers, in the ordinary course of business, portions of the goods on credit, and thereafter made an assignment to defendant for the benefit of creditors, when the vendor, for the first time, discovered the fraud; that the claims against the sub-vendees were among the assets that passed by the assignment, and that these claims were collected by the assignee after the assignment and after notice from the plaintiff of

rescission of the original sale for the fraud, *held*, that the action was maintainable, and that a judgment against the assignee, directing an accounting and payment by him of the proceeds of such collections, was proper. *Id.*

See TAX SALES.
VENDOR AND PURCHASER.

SCHENECTADY (CITY OF).

Plaintiff's common council passed certain resolutions declaring that obstructions and deposits existed in M. creek, a non-navigable stream, not a public highway, running through the lands of F., defendants' testator, within the city limits, which obstructions caused stagnant water to accumulate detrimental to health, etc., and requiring the same to be removed at the expense of the owners or occupants. The resolutions contained a description of the width and depth of the creek, which was declared to be its natural and normal channel and grade, and all matter lying in the creek above such grade and channel to be obstructions and deposits. After the adoption of the resolution F. cleaned out the portion of the creek flowing through his lands to its natural and normal bed and banks. Thereafter plaintiff's superintendent of streets entered, cut down the banks and trees growing thereon, and widened the natural channel. *Held*, that an action was not maintainable to recover the expenses so incurred; that the work done by F. was all that the common council had power to require. *City of Schenectady v. Furman.* 482

SPECIFIC PERFORMANCE.

1. In an action brought to compel specific performance of a contract for the purchase of certain real estate by defendant, situate in the city of Brooklyn, these facts appeared: The premises formerly belonged to a savings bank. In an action brought by the attorney-general in the name of the People

to sequester the property of the bank, an order was made without notice to the attorney-general or the depositors, directing the sale of the real estate at public auction, and providing that any of the trustees of the bank might become purchasers at the sale. Plaintiffs, who were such trustees, became the purchasers, received the usual deed and went into possession. After the contract with defendant was executed, an order was made in said action, on motion to the bank and the attorney-general, confirming the sale. Thereafter a depositor applied for leave to intervene in the action, and to have the sale set aside on the ground that the order directing the sale and permitting the trustees to purchase was invalid. The application was heard on the merits "as fully to all intents and purposes as though the order of confirmation * * * had not been made," and the court decided that the proceedings and sale were valid and binding on all the parties interested, which order was affirmed on appeal (188 N. Y. 658). *Held*, that the decision settled the validity of the title, upon the points involved, as to all the world; also that the bank was not a necessary party to that proceeding. *Webster v. R. C. T. Co.* 275

2. By the contract the plaintiffs agreed to convey "free from all incumbrances;" at the time of its execution there were mortgages on the premises then due and unsatisfied, and which still remain liens thereon. The deed tendered contained full covenants on the part of the vendors, without mention of the mortgages; there was evidence, however, justifying a finding that the mortgages were kept alive at the instance of defendant, and that it waived a literal performance of the contract in respect to incumbrances. The judgment below permits defendant to deduct from the purchase money the amount of the mortgages, and to accept the conveyance, and enjoins it from asserting that the existence of the mortgages constitutes a breach of said covenant. *Held*, that the judgment was proper. *Id.*

3. Defendant objected that the building upon the premises encroaches upon the street line. It appeared that the granite foundation of the water table of the building extends five inches and the door posts one foot three inches outside of the building line, which is the street line. It did not appear that the city authorities consented to this encroachment; but so far as appeared they had not objected thereto. The building had been erected more than twenty years, and by the almost uniform usage in the city in constructing buildings of like character, the water tables and entrances are made to project a little beyond the building line. It also was found that defendant, after making the contract, waived the objection. *Held*, that it was untenable here. *Id.*

4. A., one of the original plaintiffs, died after the trial. The deed tendered on the trial, which was duly executed and acknowledged by A. and the other plaintiffs, was placed under the control of the court in the hands of the clerk. *Held*, that the death did not abate the action, nor was it necessary that a new conveyance from his heirs should be procured; that the delivery to the clerk was a good delivery in *escrow*, which was not defeated by the death. *Id.*

5. In an action for the specific performance of a contract between S., plaintiff's testator, and defendant for the purchase by the latter of certain lands to which the former claimed title under a sale by virtue of a judgment in equity of a U. S. Circuit Court, these facts appeared: The action in which said judgment was rendered was brought by judgment creditors of a partnership to reach the real estate, the title to which was in the name of one or more of the co-partners, but which plaintiff claimed belonged to and was held in trust for the firm. The infant children of G., a deceased member of the firm, were made a party, but were not personally served with process. In the action in which the creditors obtained their judgment, an attachment was issued which was levied upon the

land in question. The judgment asked in the equity suit was that the land be declared partnership property, and that it be sold to pay plaintiff's judgment. A *lis pendens* was filed therein. On petition of the mother of the infants, a guardian *ad litem* was appointed and a solicitor appeared for them. Judgment was rendered granting the relief sought. The purchaser on sale in pursuance thereof refused to take the title tendered, and on motion to compel him so to do, the court held the title good. *Held*, that the decision, it not appearing that it was contrary to other decisions of the Federal courts, should be followed here; and so, that a judgment in favor of plaintiff was proper. *Sloane v. Martin.* 524

STATE.

— *As to title of state to lands sold by the comptroller for unpaid taxes and bid in by him for the state.*
See People v. Turner. 451

STATE COMPTROLLER.

See COMPTROLLER.

STATUTES.

A law changing procedure applies thereafter as well to actions pending when the statute was passed as to those subsequently commenced, unless the former are specially excepted. *Lazarus v. Met. E'l. R. Co.* 581

— § 663, *chap. 410, Laws of 1882.*

— *Chap. 84, Laws of 1887.*

See Health Dept. v. Rector, etc., 32.

— *Chap. 226, Laws of 1849.*

— *Chap. 469, Laws of 1882.*

— § 55, *chap. 688, Laws of 1892.*

— § 52, *chap. 689, Laws of 1892.*

See Hirschfeld v. Bopp, 84.

— § 4, *chap. 515, Laws of 1889.*

See People v. Girard, 105.

— 1 R. S. 390, § 9, *sub. 4.*

— § 1, *chap. 202, Laws of 1892.*

— § 1, *chap. 37, Laws of 1855.*

See People ex rel. Bird v. Barker, 239.

— *Sub. 6, chap. 342, Laws of 1885.*

See Morton v. Tucker, 244.

- § 307, *chap. 410, Laws of 1882.*
 — *Chap. 365, Laws of 1885.*
See People ex rel. Brady v. Martin,
 253.
 — § 1109, *chap. 410, Laws of 1882.*
 — *Chap. 104, Laws of 1893.*
See People ex rel. Follett v. Fitch,
 261.
 — 2 R. S. 88, § 36.
See In re Van Stooten v. Dodge, 328.
 — 1 R. S. 677, §§ 47, 48.
See Hopkins v. Kent, 363.
 — *Chap. 448, Laws of 1885.*
See People v. Turner, 451.
 — R. S. 766, § 13.
 — *Chap. 476, Laws of 1862.*
See Buck v. Alley, 488.
 — *Chap. 225, Laws of 1873.*
See In re Harriot, 540.
 — § 31, *chap. 677, Laws of 1892.*
 — § 1, *chap. 688, Laws of 1894.*
See Lazarus v. Metropolitan E. R.
Co., 581.
 — § 3, *chap. 542, Laws of 1880.*
 — *Chap. 193, Laws of 1889.*
See People ex rel. Western Electric
Co. v. Campbell, 587.

See FRAUDS (STATUTE OF).
 LIMITATIONS (STATUTE OF).

STATUTE OF FRAUDS.

See FRAUDS (STATUTE OF).

STOCKHOLDER.

1. A creditor of a domestic banking corporation, seeking to charge a stockholder under the statute, is bound to allege and prove all the facts upon which the liability depends; he must aver the performance of conditions precedent, or set forth facts which in law excuse their performance. *Hirschfeld v. Bopp.* 84
2. Under the section of the Banking Law (§ 52, *chap. 689, Laws of 1892*) which provides that "except as prescribed in the Stock Corporation Law," the stockholders of a banking corporation shall be individually responsible for its debts to the extent of the amount of their stock, etc., the provisions of the Stock Corporation Law, having general application, which relate to the liability of stockholders in corporations, are to be

considered as incorporated in the section, and the words "except as prescribed in" are to be construed as though the language was "subject to the limitations in." *Id.*

3. The liability, therefore, of a stockholder of a banking corporation is subject to and limited by the conditions affixed to the liability of stockholders prescribed by the "Stock Corporation Law" (§ 55, *chap. 688, Laws of 1892*), *i. e.*, (1) the recovery of a judgment against the corporation for the debt and the return of an execution thereon unsatisfied; (2) that the debt was payable within two years from the time it was contracted; (3) that the action against the corporation was brought within two years after the debt became due, and, if the action is brought against a stockholder after he ceased to be such, that it be brought within two years after that time. *Id.*

4. *It seems*, that when an action has been brought by the People against such a corporation, and a judgment has been rendered therein dissolving it, sequestrating its property, appointing a receiver, and restraining creditors from bringing suit against it, this is an excuse for the non-performance of the condition precedent requiring a judgment against the corporation and the return of an execution unsatisfied. *Id.*

5. *It seems*, also, that when the insolvency of the corporation has been judicially declared, and all its assets are in the custody of the law for equal distribution among creditors, an action in equity, brought in behalf of all the creditors, against the stockholders, to enforce their liability, in which the receiver is joined as defendant, is a just and reasonable method of ascertaining and having finally determined the respective liabilities of the stockholders. *Id.*

STREETS.

See HIGHWAYS.

SUROGATE'S COURTS.

1. Upon a final settlement of the accounts of executors, these facts appeared: In proceedings taken before the surrogate by legatees to revoke the letters testamentary, a citation was issued, and the executors were enjoined from acting as such until the determination of the surrogate upon the application. The executors resisted the application, and the proceedings resulted in an order revoking the letters unless the executors gave a bond as prescribed by the Code of Civil Procedure (§ 2687, sub. 3), and charging them with the disbursements of the petitioners. The executors complied with the order, continued in the performance of their duties, and on the final accounting claimed a credit for the amounts they alleged they were liable to pay their counsel for services performed while they were so enjoined and for services rendered by their attorney in resisting said application. The surrogate found, upon evidence justifying the findings, that the application was unreasonably resisted, and he disallowed the claim. *Held*, that this was within the discretion of the surrogate and, the General Term having affirmed his decree, this court could not interfere. *In re O'Brien*. 379
2. An order of a Surrogate's Court fixing the fees of appraisers of the estate of a deceased testator is a final order affecting a substantial right, and so is appealable to the General Term and to this court. (Code Civ. Pro. §§ 2570, 190.) *In re Harriot*. 540
3. The N. Y. L. I. & T. Co., as executor of the will of H., commenced an action to have its accounts as such settled. The legatees under the will objected to items in the account stated to have been paid the appraisers of the estate for their services; these had not been verified by affidavit of the executor and adjusted by the surrogate before payment as prescribed by the statute then in force. (Chap. 225, Laws of 1873; see, also, Code Civ. Pro. § 2711, as

amended in 1893.) Pending the trial of the action before a referee, the executor, upon affidavits of the appraisers and their stipulation as attorneys for the executor, procured an order from the surrogate taxing their fees at \$250 each. The legatees, under the will, thereupon, upon notice to the executor and appraisers, moved for an order vacating the order taxing said fees, which motion was denied, and the surrogate's order was affirmed by the General Term. *Held*, that the legatees had the right to make the motion, and that the orders below were reviewable here. *Id.*

4. Appraisers are officers of the court, and the amount of their fees being fixed by statute (Code Civ. Pro. § 2565), they have no right to demand or receive more than the statute allows, however large the estate may be, unless the parties interested consent. *Id.*
5. It appeared by the affidavits upon which the motion to vacate was made that the estate, aside from household furniture and items of cash on hand, consisted of twenty-seven different items of corporate stock and other securities; that the counsel for the legatees filled out the inventory, except as to the securities and cash, and this part was prepared by the executor; that the furniture was appraised in a lump sum, and the appraisers had nothing to do in regard thereto save to see that the furniture was in the house; that the value of the securities could have been ascertained in a single day's time. No affidavits were read in opposition. The surrogate, however, took into consideration the affidavits of the appraisers used on the original motion, which, without giving any items, stated generally that each of them had actually and necessarily been employed more than fifty days. The surrogate so found. *Held*, that the facts did not justify the finding, and that the order denying the motion to vacate was error. *Id.*

— As to power of surrogate on accounting of executor.
See In re Mullon. 98

SUSPENSION OF POWER OF ALIENATION.

1. The holographic will of S. contained a clause which, after a bequest to a son of the testator of certain shares of stock, proceeded as follows: "To be held in trust by my executors ten years from and after my decease, then to be delivered and transferred to them; if deceased, do and continue the same to his son William, now in his eighth year; if both are deceased before the ten years have expired, then transfer and deliver the said shares to my daughters." The clause then named two daughters and provided that if either was deceased her portion should be transferred to the survivor, and in case of the death of both, to a daughter-in-law named or her heirs. In an action to obtain a construction of the will, *held*, that there was no unlawful suspension of the power of alienation; that the suspension was not for an arbitrary and fixed period, nor was the trust so limited, but both inevitably terminated upon the expiration of the two named lives, and could only run for the ten years on condition that one or both of the selected lives continue so long. *Montignani v. Blade*. 111
2. By another clause of the will certain shares of stock were given to a daughter-in-law of the testator to be held "in trust seven years" from his death for the benefit of the daughter-in-law and her daughter, and then to be transferred and delivered to the latter. In case of the death of the grandchild before the expiration of the seven years, it was provided that "this bequest to her shall be given and transferred to her mother;" if both die, then "to the heirs" of a son of the testator. *Held*, that the trust was measured by two lives in being at its creation, and so was valid; that by the provision for the ultimate vesting of the stocks in the "heirs" of the testator's son, those who would be next of kin if he were dead were intended. *Id.*
3. By another clause the testator gave to M., a daughter, a house

and lot with the furniture therein "for her occupancy and use," the same (using the language of the will) "to be held in trust by my executors seven years from and after my decease," also certain shares of stock, the dividends to be collected and paid to the daughter. At the expiration of the seven years it was provided that "the foregoing bequests shall be transferred and delivered to" M. If M. should die before the expiration of the seven years it was provided that "these bequests shall be delivered to or disposed of" as a daughter and a son of the testator named "shall request and direct," the proceeds to be paid to three persons named. *Held*, that the trust was valid, as it only ran for one life or the shorter period of seven years within that life. *Id.*

TAX SALES.

In an action of replevin, brought in the name of the People by the forest commission, to recover logs cut by defendant upon lands included in what is known as the "forest preserve of the state of New York," plaintiff claimed title through a conveyance to the state by the comptroller, who had purchased the lands at tax sales made for unpaid taxes for the years 1866 to 1870 inclusive; this conveyance was executed after the two years allowed for redemption had expired; the deed to the state was recorded three years before the passage of the act of 1885 (Chap. 448, Laws of 1885), which provides that all conveyances theretofore executed by the comptroller, "after having been recorded for two years, * * * shall, six months after this act takes effect, be conclusive evidence that the sale and all proceedings prior thereto * * * were regular." This action was brought after the expiration of the six months. Defendant claimed that the tax sale was illegal and void for the reason that the unpaid tax for 1867 was based on an assessment roll verified before the third Tuesday of August, and that in 1870 the assessors omitted to meet on the third Tuesday of August. *Held*, that these were

not jurisdictional defects, but simply irregularities in the proceedings; that conceding the irregularities to have been such as to render the sale invalid, the owner had his remedy and an opportunity to be heard, by appeal to the board of supervisors, and also by appearance before the comptroller and demand for the cancellation of the tax; and that after the expiration of the six months the defects were cured by the statute. *People v. Turner.* 451

TITLE.

In 1872 C., plaintiff's testator, who was half-brother of defendant, and at whose request she and her husband had come to the city of Kingston to reside, requested the husband to build a house for her on land owned by C., at a cost specified, and to bring the bills to him for payment. The house was built at a cost exceeding by about \$1,200, the sum named, which sum C paid, and defendant went into occupation thereof and made valuable improvements upon the premises, of which C. had knowledge. After defendant had contracted to build the house C. stated that it was built for defendant and was hers, and so spoke of it to different persons at various times. In an action of ejectment to recover possession of the premises, the court found that the improvements, as well as the payment of the \$1,200, were made and expended on the faith of the promises of C. to give the property to defendant. The court also found that the total amount expended by defendant for permanent improvements, repairs, taxes, insurance, etc., from the beginning of the erection of the house to the time of trial was \$4,734.26, and the fair rental value during that period was \$5,000. *Held*, that defendant was the owner of the equitable title; and so, that the action was not maintainable. *Young v. Overbaugh.* 158

— As to title of state to lands sold by the comptroller for unpaid taxes and bid in by him for the state. See *People v. Turner.* 451

TRADE.

In an action brought by the attorney-general to vacate the charter of defendant, a domestic corporation, and to annul its corporate existence, these facts appeared: In defendant's charter the object of its organization was stated to be the "buying and selling of milk at wholesale and retail." A large majority of the stockholders were milk dealers in the city of New York, and creamery or milk commission men in that vicinity. At the first meeting of its board of directors a by-law was adopted declaring that said board "shall have the power to make and fix the standard or market price at which milk shall be purchased by the stockholders of the company." Acting under this by-law the board fixed from time to time the price of milk to be paid by dealers. No milk was purchased by defendant, but it did a commission business, selling milk for farmers to dealers, who would purchase at the price fixed, guaranteeing payment and charging a commission therefor. The prices so fixed largely controlled the market in and about said city. *Held* (PECKHAM, J., dissenting), that the evidence justified a finding that the corporation was a combination inimical to trade and commerce, and so unlawful, and that a judgment granting the relief sought was proper. *People v. Milk Exchange.* 267

TRIAL.

1. A witness may be re-examined by the party calling him upon all topics on which he has been cross-examined; and this, although the cross-examination was as to facts not admissible in evidence. *People v. Buchanan.* 1
2. In an action to recover damages for personal injuries resulting from defendant's negligence, it appeared that about six months after the accident causing the injury plaintiff's eyes began to be affected, he being unable to see clearly. Plaintiff went to a doctor, who told him the trouble was

far-sightedness, which the use of glasses would remedy. An expert oculist called by defendant testified that he had examined plaintiff's eyes and that they were wholly uninjured, but far-sighted. The court was asked on behalf of defendant, but refused, to charge that there was no evidence justifying the jury in finding that the condition of plaintiff's eyesight was attributable to the injury. *Held*, error; that the question was one entirely outside of ordinary experience and only capable of being answered by scientific skill, and, as this answer was adverse to plaintiff's claim, there was no question for the jury. *Saumby v. City of Rochester*.

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3. Where the defendant at the close of the evidence on trial of an action by a jury, moves the court to direct a verdict in his favor, without specify any ground, and the motion is denied and he excepts, and a verdict is rendered against him, he cannot maintain his exception on appeal by showing that there was a defect in the proof upon some points, and so that the facts did not authorize the verdict, provided that the failure of proof might have been supplied, had the attention of the other side been called to the defect. *Haines v. N. Y. C. & H. R. R. Co.*

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4. In an action to recover damages for the alleged negligent killing of plaintiff's intestate, the case was contested on the ground that there was no negligence on defendant's part, and that there was contributory negligence on the part of the decedent, and at the conclusion of the whole evidence defendant's counsel asked the court to direct a judgment for defendant, but stated no ground therefor, which motion was denied and defendant excepted. A verdict was rendered for plaintiff and an appeal was brought on the sole point that decedent was upon the evidence, as matter of law, chargeable with contributory negligence. *Held*, that the general exception to the denial of the motion was insufficient to present this question,

as it was one upon which additional proof might have been given by plaintiff had it been specified. *Id.*

5. In an action to recover damages for negligence causing the death of plaintiff's intestate, a boy five years of age, it appeared that plaintiff was the father and next of kin of the decedent. The court charged in substance that while the father had no legal claim to the earnings of the son beyond the age of twenty-one years, he could compel the son to support him in his old age, and the jury had the right to consider this fact. Defendant's counsel thereupon requested the court to charge that the father had no claim on the earnings of the son after maturity, except in case the former becomes poor, unable to support himself and the son is shown to have means. The court declined so to charge. *Held*, error. *Keenan v. Bklyn. C. R. R. Co.*

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6. Where fraud is alleged as the basis of an action it must be proved; a recovery may not be had on proof of a right of action on contract, or of some other character, although facts are proved which, in a proper form of action, would justify the recovery. *Truesdell v. Bourke*.

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TRUSTS AND TRUSTEES.

1. The holographic will of S. contained a clause which, after a bequest to a son of the testator of certain shares of stock proceeded as follows: "To be held in trust by my executors ten years from and after my decease, then to be delivered and transferred to them; if deceased, do and continue the same to his son William, now in his eighth year; if both are deceased before the ten years have expired, then transfer and deliver the said shares to my daughters." The clause then named two daughters, and provided that if either was deceased her portion should be transferred to the survivor, and in case of the death of both, to a daughter-in-law named or her heirs. In an action to obtain a

construction of the will, *held*, that there was no unlawful suspension of the power of alienation; that the suspension was not for an arbitrary and fixed period, nor was the trust so limited, but both inevitably terminated upon the expiration of the two named lives, and could only run for the ten years on condition that one or both of the selected lives continue so long. *Montignani v. Blade*. 111

2. By another clause of the will certain shares of stock were given to a daughter-in-law of the testator to be held "in trust seven years" from his death for the benefit of the daughter-in-law and her daughter, and then to be transferred and delivered to the latter. In case of the death of the grandchild before the expiration of the seven years, it was provided that "this bequest to her shall be given and transferred to her mother;" if both die, then "to the heirs" of a son of the testator. *Held*, that the trust was measured by two lives in being at its creation, and so was valid: that by the provision for the ultimate vesting of the stocks in the "heirs" of the testator's son, those who would be next of kin if he were dead were intended. *Id.*

3. By another clause the testator gave to M., a daughter, a house and lot with the furniture therein "for her occupancy and use," the same (using the language of the will) "to be held in trust by my executors seven years from and after my decease," also certain shares of stock, the dividends to be collected and paid to the daughter. At the expiration of the seven years it was provided that "the foregoing bequests shall be transferred and delivered to" M. If M. should die before the expiration of the seven years it was provided that "these bequests shall be delivered to or disposed of" as a daughter and a son of the testator named "shall request and direct," the proceeds to be paid to three persons named. *Held*, that the trust was valid, as it only ran for one life or the shorter period of seven years within that life; that although the testator described

his disposition as "bequests" it covered the real as well as the personal property; that the provision giving some power or authority to the son and daughter could not be construed as a power of appointment or as conferring upon them any estate, but simply made them arbitrators in case of any disagreement between the three beneficiaries as to an actual division or a sale and division of the proceeds. *Id.*

4. Another clause provided that "from the cash funds" belonging to the testator in a bank named, his funeral and burial expenses and other just claims against him should be paid, and the residue, if any, paid to M. The will was executed in November, 1889. In November, 1890, the testator borrowed \$300 from said bank, giving his note therefor. In December thereafter he executed to the president and cashier of the bank a formal transfer of ten shares of stock, containing a power of sale which he sent to the transferees with a letter directing them to pay with the proceeds his indebtedness to the bank and pay the balance to M. In 1891 the testator paid the note, but left the stock in the hands of the bank, and soon thereafter procured another loan. At the testator's death there was about \$150 to his credit on the books of the bank. The second loan had not been paid, but the bank had not resorted to said collateral. M. was the testator's housekeeper, and he was in the habit of giving her money to pay household expenses. The trial court adjudged that an express trust was created in the stock for the benefit of M. *Held*, that this portion of the decision was invalid; that the action being simply for the construction of the will the court had no power to go outside of it, and construe an independent business agreement. *Id.*
5. *It seems*, that no trust was created in the stock, nor was there a gift thereof to M. *Id.*
6. When a person, through the influence of a confidential relation, acquires title to property, the court, to prevent an abuse of con-

fidence, may impress upon the property an implied trust and so grant relief. *Goldsmith v. Goldsmith*. 313

7. G., the mother of the parties to this action, was the owner of a house and lot in the city of B., which was incumbered by a mortgage. The children lived with their mother, and the premises furnished a home for the family. In February, 1887, G., having become incapacitated for further care and management of the property, deeded the same to defendant without consideration, in pursuance of a parol agreement and promise on his part that he would hold the same for the benefit of the plaintiffs in common with himself, and would give them their shares in it. The plaintiffs were at that time minors. It was agreed that defendant should have all the accruing rents and his board in the family without charge, he to pay the interest on the mortgage and the taxes on the property. G. died in March thereafter. The agreement was carried out during her life and for some time thereafter. Defendant then sold the property, and with a portion of the avails purchased another house and lot; he was asked to take the deed in the name of all the children, but objected, promising, however, to execute a separate paper acknowledging and securing plaintiff's rights in the property. Thereafter he repudiated the agreement and claimed to be the sole and absolute owner. In an action to compel performance of the agreement, *held*, that the arrangement was founded upon the relation of mother and son and brothers and sisters, and involved the trust and confidence growing out of these relations; that the denial by defendant of the rights of plaintiffs was a fraud upon them and upon the purpose of the deceased mother; that, conceding no express trust was created, a trust might be implied and properly enforced to prevent and redress the fraud, which trust is unaffected by the Statute of Frauds. *Id.*

8. Also, *held*, that although an intended fraud was not explicitly

and by the use of that word charged in the complaint, yet, as all the facts showing it were therein fully and clearly stated, the omission was not, after judgment, material. *Id.*

9. The holographic will of K. by its terms gave to his executors all of his estate, in trust, among other things to divide the income into four equal parts, one part to be paid to his wife during life, upon her death (using the language of the will) "her share to revert to my trustees for the benefit of my three children, their heirs and assigns, under the supervision of my trustees," to each of the children one-third; the testator left another child aside from those referred to and named in said provision. In an action for the construction of the will, *held*, the testator's intent was that his widow should receive the income of one-fourth of his estate, and this vested in her an equitable life estate in the share itself; that upon her death the purpose for which the trust was created was served, the estate of the trustees terminated, and the whole legal and equitable estate vested absolutely in the three children. (1 R. S. 677, §§ 47, 48.) *Hopkins v. Kent*. 363

10. While a trustee is to be held to the most rigid accountability for the performance of all his duties as such, the true question in any case, where he is charged with negligence, is as to whether, considering all the facts and circumstances, he employed in the matter complained of such prudence and diligence in the discharge of his duties as in general, men of average prudence and discretion would employ in their own affairs, and in determining this, the facts as they existed at the time are to be considered, without regard to those which subsequently took place, by reason of which a loss occurred. *Purdy v. Lynch*. 462

11. R., who had been one of the managing officers of a savings bank which became insolvent, in order to secure the depositors in the bank, executed to three trus-

tees, D., L. & Q., a conveyance of certain real estate; they to sell the same and with the proceeds pay the depositors, who would execute to R. subrogations of their rights against the bank, so much of their deposits as were not paid by the receiver of the bank. It was understood that Q. was to be and he was appointed receiver. Q. was a well-known business man of high character and financial ability; he was well known to R., and acceptable to him both as trustee and receiver. In an action brought against the trustees for an accounting these facts appeared: A large sum was received from the sale of the real estate and from rents thereof, all of which went into the hands of Q., who paid out the whole thereof in the execution of the trust, save a balance of \$32,962.96, which was unaccounted for; of the proceeds of the sales over \$17,000 came into Q.'s hands directly, and were never in the possession or under the control of the other trustees. The trustees appointed an agent to collect the rents, who collected over \$18,000, which he paid over to Q. *Held*, that for these sums D. & L. were not liable, and as they amounted to more than the deficit, there was nothing for which they could be held liable. *Id.*

12. There were a large number of depositors, all of whose claims were due. Most of the proceeds of sales were deposited by the trustees with a trust company, and subsequently from time to time were drawn out by them and transferred to Q. to enable him to at once pay the depositors, and take the subrogations as provided for in the trust deed. *Held*, that under the circumstances, and in the absence of any proof or claim that the transfers were made at times when there was no pretense of their being needed to pay depositors, D. & L. were not chargeable with such negligence in making the transfers as would make them liable for the failure of Q. to account for all the money that thus came into his possession; that they had the right to transfer at one time

funds enough to answer all contingencies and more than enough for any one day or one week's payments. *Id.*

13. Also, *held*, that the trustees, in the performance of their duties, had a right to appoint an agent to do some of their work, and were not precluded from appointing one of their number as such agent. *Id.*

14. P., by his will, gave to his daughter F. \$20,000 in trust, "the same to revert at her death without issue" to the testator's widow and son. In an action brought by the executors it was adjudged that the fund was payable to F.; that she was, however, not at liberty to spend or waste the principal, but was bound to keep it securely invested for the benefit of the remaindermen. The money was paid over to F. pursuant to the judgment. The widow thereafter died, and her executor made a motion at the foot of the decree for an order requiring F. to give security for the fund. These facts appeared thereon: The whole fund having been hopelessly lost by unfortunate investments, F. insured her life for \$20,000 to provide for its ultimate restitution. Her mother protested against this, asked F. not to continue the policies, and promised to forgive her the loss, and not call upon her for the fund. F. paid the premiums for a time, and then notified her brother of her inability to continue this, and suggested that he continue the policies; this he refused; she thereupon allowed \$10,000 of the insurance to lapse. The court required F. to give security for the one-half of the fund payable to the brother, but refused the application as to the one-half going to the mother. F. complied with the order. On appeal by the executor, *held*, that there was no absolute legal right to the security sought, but the matter rested in the reasonable discretion of the Special Term; and that this discretion had been exercised in behalf of the moving parties as fully as was justified. *Hitchcock v. Peaslee.* 547

fidence, may impress upon the property an implied trust and so grant relief. *Goldsmith v. Goldsmith*. 313

7. G., the mother of the parties to this action, was the owner of a house and lot in the city of B., which was incumbered by a mortgage. The children lived with their mother, and the premises furnished a home for the family. In February, 1887, G., having become incapacitated for further care and management of the property, deeded the same to defendant without consideration, in pursuance of a parol agreement and promise on his part that he would hold the same for the benefit of the plaintiffs in common with himself, and would give them their shares in it. The plaintiffs were at that time minors. It was agreed that defendant should have all the accruing rents and his board in the family without charge, he to pay the interest on the mortgage and the taxes on the property. G. died in March thereafter. The agreement was carried out during her life and for some time thereafter. Defendant then sold the property, and with a portion of the avails purchased another house and lot; he was asked to take the deed in the name of all the children, but objected, promising, however, to execute a separate paper acknowledging and securing plaintiff's rights in the property. Thereafter he repudiated the agreement and claimed to be the sole and absolute owner. In an action to compel performance of the agreement, *held*, that the arrangement was founded upon the relation of mother and son and brothers and sisters, and involved the trust and confidence growing out of these relations; that the denial by defendant of the rights of plaintiffs was a fraud upon them and upon the purpose of the deceased mother; that, conceding no express trust was created, a trust might be implied and properly enforced to prevent and redress the fraud, which trust is unaffected by the Statute of Frauds. *Id.*

8. Also, *held*, that although an intended fraud was not explicitly

and by the use of that word charged in the complaint, yet, as all the facts showing it were therein fully and clearly stated, the omission was not, after judgment, material. *Id.*

9. The holographic will of K. by its terms gave to his executors all of his estate, in trust, among other things to divide the income into four equal parts, one part to be paid to his wife during life, upon her death (using the language of the will) "her share to revert to my trustees for the benefit of my three children, their heirs and assigns, under the supervision of my trustees," to each of the children one-third; the testator left another child aside from those referred to and named in said provision. In an action for the construction of the will, *held*, the testator's intent was that his widow should receive the income of one-fourth of his estate, and this vested in her an equitable life estate in the share itself; that upon her death the purpose for which the trust was created was served, the estate of the trustees terminated, and the whole legal and equitable estate vested absolutely in the three children. (1 R. S. 677, §§ 47, 48.) *Hopkins v. Kent*. 363

10. While a trustee is to be held to the most rigid accountability for the performance of all his duties as such, the true question in any case, where he is charged with negligence, is as to whether, considering all the facts and circumstances, he employed in the matter complained of such prudence and diligence in the discharge of his duties as in general, men of average prudence and discretion would employ in their own affairs, and in determining this, the facts as they existed at the time are to be considered, without regard to those which subsequently took place, by reason of which a loss occurred. *Purdy v. Lynch*. 462

11. R., who had been one of the managing officers of a savings bank which became insolvent, in order to secure the depositors in the bank, executed to three trus-

tees, D., L. & Q., a conveyance of certain real estate; they to sell the same and with the proceeds pay the depositors, who would execute to R. subrogations of their rights against the bank, so much of their deposits as were not paid by the receiver of the bank. It was understood that Q. was to be and he was appointed receiver. Q. was a well-known business man of high character and financial ability; he was well known to R., and acceptable to him both as trustee and receiver. In an action brought against the trustees for an accounting these facts appeared: A large sum was received from the sale of the real estate and from rents thereof, all of which went into the hands of Q., who paid out the whole thereof in the execution of the trust, save a balance of \$32,962.96, which was unaccounted for; of the proceeds of the sales over \$17,000 came into Q.'s hands directly, and were never in the possession or under the control of the other trustees. The trustees appointed an agent to collect the rents, who collected over \$18,000, which he paid over to Q. *Held*, that for these sums D. & L. were not liable, and as they amounted to more than the deficit, there was nothing for which they could be held liable. *Id.*

12. There were a large number of depositors, all of whose claims were due. Most of the proceeds of sales were deposited by the trustees with a trust company, and subsequently from time to time were drawn out by them and transferred to Q. to enable him to at once pay the depositors, and take the subrogations as provided for in the trust deed. *Held*, that under the circumstances, and in the absence of any proof or claim that the transfers were made at times when there was no pretense of their being needed to pay depositors, D. & L. were not chargeable with such negligence in making the transfers as would make them liable for the failure of Q. to account for all the money that thus came into his possession; that they had the right to transfer at one time

funds enough to answer all contingencies and more than enough for any one day or one week's payments. *Id.*

13. Also, *held*, that the trustees, in the performance of their duties, had a right to appoint an agent to do some of their work, and were not precluded from appointing one of their number as such agent. *Id.*

14. P., by his will, gave to his daughter F. \$20,000 in trust, "the same to revert at her death without issue" to the testator's widow and son. In an action brought by the executors it was adjudged that the fund was payable to F.; that she was, however, not at liberty to spend or waste the principal, but was bound to keep it securely invested for the benefit of the remaindermen. The money was paid over to F. pursuant to the judgment. The widow thereafter died, and her executor made a motion at the foot of the decree for an order requiring F. to give security for the fund. These facts appeared thereon: The whole fund having been hopelessly lost by unfortunate investments, F. insured her life for \$20,000 to provide for its ultimate restitution. Her mother protested against this, asked F. not to continue the policies, and promised to forgive her the loss, and not call upon her for the fund. F. paid the premiums for a time, and then notified her brother of her inability to continue this, and suggested that he continue the policies; this he refused; she thereupon allowed \$10,000 of the insurance to lapse. The court required F. to give security for the one-half of the fund payable to the brother, but refused the application as to the one-half going to the mother. F. complied with the order. On appeal by the executor, *held*, that there was no absolute legal right to the security sought, but the matter rested in the reasonable discretion of the Special Term; and that this discretion had been exercised in behalf of the moving parties as fully as was justified. *Hitchcock v. Peaslee.* 547

UNITED STATES COURTS.

1. The provision of the United States Revised Statutes (§ 725), providing that the United States courts shall have power to punish "by fine or imprisonment, at the discretion of the court, contempt of their authority," limits the power to the modes of punishment specified and operates as a negation of any other method. *Hovey v. Elliott*. 126
2. The said provision applies to the Supreme Court of the District of Columbia. *Id.*
3. The said court having been created by act of congress, not by the Constitution, congress may restrict and limit the exercise of its power in the respect specified, and this although it may have given it general jurisdiction in law and equity. *Id.*
4. The said provision applies to civil as well as to criminal contempts. *Id.*
5. Plaintiff's firm filed a bill in said court to enforce an alleged lien upon an award. R., a member of the firm of R. & Co., bankers, was appointed receiver, and a portion of the award, sufficient to meet plaintiff's claim, was paid over to him. Pursuant to the directions of the court, the receiver invested the fund in certain bonds. The defendants demurred to plaintiff's bill, the demurrer was sustained and a decree entered dismissing the bill and directing the receiver to pay over the funds in his hands to the defendants. R. thereupon delivered the bonds to defendants, who on the same day sold them for full value to R. & Co. The decree was reversed on appeal, an answer was interposed, and pending the trial of the issues defendants were adjudged in contempt for disobedience of an order of the court, their answer ordered to be stricken out, and thereupon a judgment *pro confesso* was entered adjudging that plaintiffs had a lien upon the bonds. In an action based on said judgment, brought against R. & Co. to enforce the lien, it did not appear that they had any notice of the contempt proceedings. *Held*, that the court had no jurisdiction to strike out the answer; that said judgment was void as against R. & Co.; that as purchasers *pendente lite* they took the risk of the litigation then pending, but did not assume the risk of any punishment inflicted on the defendants therein in an independent proceeding; and so, that the complaint herein was properly dismissed. *Id.*
6. Where the jurisdiction of a Federal court is invoked, with reference to real estate in which an infant has an interest, by proceedings *in rem*, or of that nature, service of process upon the infant is not essential to the attaching of the jurisdiction. *Sloane v. Martin*. 524
7. While in such a case the jurisdiction can only be exercised, upon notice to the parties interested, if they have notice in fact, any irregularity, although it may be reversible error, does not necessarily render the judgment void. *Id.*
8. In an action for the specific performance of a contract between S., plaintiff's testator, and defendant for the purchase by the latter of certain lands to which the former claimed title under a sale by virtue of a judgment in equity of a U. S. Circuit Court, these facts appeared: The action in which said judgment was rendered was brought by judgment creditors of a partnership to reach the real estate, the title to which was in the name of one or more of the co-partners, but which plaintiff claimed belonged to and was held in trust for the firm. The infant children of G., a deceased member of the firm, were made a party, but were not personally served with process. In the action in which the creditors obtained their judgment an attachment was issued which was levied upon the land in question. The judgment asked in the equity suit was that the land be declared partnership property and that it be sold to pay plaintiff's judgment. A *lis pendens* was filed therein. On petition of the mother of the infants a guardian *ad litem* was appointed

and a solicitor appeared for them. Judgment was rendered granting the relief sought. The purchaser on sale in pursuance thereof refused to take the title tendered, and on motion to compel him so to do the court held the title good. *Held*, that the decision, it not appearing that it was contrary to other decisions of the Federal courts, should be followed here; and so, that a judgment in favor of plaintiff was proper. *Id.*

USURY.

1. The defense of usury must be founded on the loan or forbearance of money; if neither of these elements exist in a contract there is no usury, however unconscionable the contract may be. *Meaker v. Piero*. 165
2. In an action to foreclose a mortgage, wherein the defense was usury, substantially these facts appeared: In 1883 H. executed to S., plaintiff's testator, a bond and mortgage for \$2,500, payable ten years from date. In 1885 H bid in on foreclosure sale, for the benefit of defendant F., certain real estate, taking title in his own name. In 1886 S. desired H. to reduce his debt to \$1,000, which H. agreed to do if S. would accept in payment \$700 in money and the bond and mortgage of F. for \$800, payable in five years from date. S. desired a bonus for taking the bond and mortgage; this H. refused to pay, but referred S. to F. The parties met; H. executed and delivered to F. a deed of the property so purchased, she executed and delivered in return her bond and mortgage on the premises for \$800. These, with \$700 in money, H. handed to S., who refused to accept them until he received "a present." F. then paid S. fifteen dollars, and thereupon the latter accepted the securities and the money in payment of \$1,500 upon the mortgage of H. *Held*, that the defense was not established; that there was no loan made by S. or forbearance on his part, but simply a change of securities for an existing debt; and that S. could lawfully demand compensation for assenting to the transaction. *Id.*

VENDOR AND PURCHASER.

1. As a general rule the owner of real estate, from the time of the execution by him of a valid contract for the sale thereof, is to be treated as the owner of the purchase money and the vendee as equitable owner of the land. *Williams v. Haddock*. 144
2. Provisions in such contract making performance on the part of the vendee of his contract to pay a portion of the purchase money and to secure the balance by mortgage on the premises a condition precedent to a conveyance by the vendor do not take the case out of the general rule. *Id.*
3. *It seems*, that after a default in the performance of these conditions precedent the rule may not apply. *Id.*
4. But prior to a default on the part of the vendee, even where by the contract time is of the essence thereof, there is an equitable conversion within said rule, subject to be reconverted upon the default happening. *Id.*
5. On March 18, 1886, C., being the owner of certain premises occupied as a brewery in the city of New York, contracted to sell the same for a sum specified. A part of this was paid down, a part was agreed to be paid on or before March 18, 1887, and the balance on that date by a bond secured by mortgage on the premises. The vendor agreed, on receipt of the second payment and of the bond and mortgage, which were to be delivered at a place specified at twelve o'clock noon of the day specified, that she would execute and deliver a deed of the premises. It was agreed that the vendees should, at the same time and place, purchase the materials, fixtures, etc., used in the business at a price, and on conditions to be agreed to in writing between the parties; otherwise that the vendor would be at liberty to refuse to consummate the sale. In case of failure of the vendees to perform at the time specified, it was provided that all their interests in, or

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right to, a conveyance should "*ipso facto* cease and determine absolutely." It was also provided that the stipulations of the contract should bind the heirs, executors, etc., of the parties. On March 27, 1881, the parties agreed in writing upon the terms of the purchase of the materials and fixtures. C. died April 22, 1881, leaving a will. The executors duly qualified, and prior to the time specified in the contract for performance they agreed with the vendees to postpone performance until June 1, 1887. On that day the vendees performed and the executors conveyed the premises. In an action brought by the executors to determine, among other things, as to whether the proceeds of sale should be distributed to the next of kin, to the exclusion of one heir not a next of kin, *held*, that there was an equitable conversion of the real estate into personality at the time of the execution of the contract, and that there was no default; that the executors, acting in good faith, had the right, prior to default, to extend the time of performance; and, therefore, that the next of kin took the avails as personal property to the exclusion of those who were only heirs at law. *Id.*

6. As a general rule a contract to convey land free from incumbrance is not satisfied by the tender of a conveyance, subject to unsatisfied and unpaid mortgages, although they are due and payable and the vendee is permitted to deduct from the purchase money the amount of such liens. *Webster v. K. C. T. Co.* 275

7. The vendee however, may dispense with the duty resting upon the vendor to pay the mortgages and procure their satisfaction, and by his conduct put himself in a position where an allowance out of the purchase money will be all he can equitably demand. *Id.*

8. In an action brought to compel specific performance of a contract for the purchase of certain real estate by defendant, situate in the city of Brooklyn, these facts appeared: The premises formerly be-

longed to a savings bank. In an action brought by the attorney-general in the name of the People to sequester the property of the bank, an order was made without notice to the attorney-general or the depositors, directing the sale of the real estate at public auction, and providing that any of the trustees of the bank might become purchasers at the sale. Plaintiffs, who were such trustees, became the purchasers, received the usual deed and went into possession. After the contract with defendant was executed, an order was made in said action, on motion to the bank and the attorney-general, confirming the sale. Thereafter a depositor applied for leave to intervene in the action, and to have the sale set aside on the ground that the order directing the sale and permitting the trustees to purchase was invalid. The application was heard on the merits "as fully to all intents and purposes as though the order of confirmation * * * had not been made," and the court decided that the proceedings and sale were valid and binding on all the parties interested, which order was affirmed on appeal (138 N. Y. 658). *Held*, that the decision settled the validity of the title, upon the points involved, as to all the world; also that the bank was not a necessary party to that proceeding. *Id.*

9. By the contract the plaintiffs agreed to convey "free from all incumbrances;" at the time of its execution there were mortgages on the premises then due and unsatisfied, and which still remain liens thereon. The deed tendered contained full covenants on the part of the vendors, without mention of the mortgages; there was evidence, however, justifying a finding that the mortgages were kept alive at the instance of defendant, and that it waived a literal performance of the contract in respect to incumbrances. The judgment below permits defendant to deduct from the purchase money the amount of the mortgages, and to accept the conveyance, and enjoins it from asserting that the existence of the mortgages constitutes a

breach of said covenant. *Held*, that the judgment was proper. *Id.*

10. Defendant objected that the building upon the premises encroaches upon the street line. It appeared that the granite foundation of the water table of the building extends five inches and the door posts one foot three inches outside of the building line, which is the street line. It did not appear that the city authorities consented to this encroachment; but so far as appeared they had not objected thereto. The building had been erected more than twenty years, and by the almost uniform usage in the city in constructing buildings of like character, the water tables and entrances are made to project a little beyond the building line. It also was found that defendant, after making the contract, waived the objection. *Held*, that it was untenable here. *Id.*

11. A., one of the original plaintiffs, died after the trial. The deed tendered on the trial, which was duly executed and acknowledged by A. and the other plaintiffs, was placed under the control of the court in the hands of the clerk. *Held*, that the death did not abate the action, nor was it necessary that a new conveyance from his heirs should be procured; that the delivery to the clerk was a good delivery in *escrow*, which was not defeated by the death. *Id.*

12. A vendor may give a warranty as to the value of the property sold, and if he makes a representation as to value, which is intended as a warranty, and it enters as a constituent element in the transaction, it becomes a part of the contract, and may be enforced as a warranty. *Titus v. Pools.* 414

See SALES.

WAIVER.

Plaintiffs, whose testator had carried on a manufacturing business, executed a bill of sale to defendants of "the entire manufactured stock * * * on hand at

foundry and store rooms" at prices specified. Portions of the property covered by the bill of sale were delivered to and taken possession of by defendants. Another portion was omitted from the inventory taken immediately after the execution of the bill of sale and was delivered to other parties under a claim made by plaintiffs that, at the time of such execution, the articles so omitted had been sold to those parties. In an action to recover the contract prices for the goods delivered, defendants alleged a breach of the contract of sale in the failure to deliver the articles omitted from the inventory, and that this was a condition precedent to a right of action. Plaintiffs thereupon amended their complaint setting up a waiver of the condition that all the goods were to be delivered. On the trial, plaintiffs were permitted to prove, under objection and exception, that during the negotiation which resulted in the sale it was spoken of and understood between the parties that plaintiffs had sold or agreed to sell a portion of the goods included in the bill of sale, and that these sales were assented to and acquiesced in by defendants; that just prior to the execution of said bill, certain of the goods were piled up and marked as sold to other parties; that, subsequent to the delivery of the bill, defendants assisted in making delivery of some of the goods to the vendees thereof, and that they acquiesced in such sales. Plaintiffs also gave evidence to the effect that the delivery of the goods mentioned in the inventory was received by defendants as a fulfillment of the requirements of the bill, and that they acquiesced in the partial delivery, only claiming damages for the omission to deliver all the goods. *Held*, that the evidence was properly received, and justified a finding of a waiver of full performance of the contract. *Brady v. Cassidy.* 171

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WATER COURSES.

A city has no power to take and appropriate the natural and permanent banks of a non-navigable stream within the municipality without paying to the owner compensation therefor. *City of Schenectady v. Furman.* 482

WILLS.

1. When in a testamentary gift of personal property the word "heirs" is used, this is to be taken to mean those in the line of distribution, i. e., the next of kin, and where the will shows on its face that the person whose heirs are referred to was to the knowledge of the testator living at the time of the execution of the will, the word refers to those who would be the next of kin were the ancestor deceased. *Montignani v. Blade.* 111

2. The holographic will of S. contained a clause which, after a bequest to a son of the testator of certain shares of stock, proceeded as follows: "To be held in trust by my executors ten years from and after my decease, then to be delivered and transferred to them; if deceased, do and continue the same to his son William, now in his eighth year; if both are deceased before the ten years have expired, then transfer and deliver the said shares to my daughters." The clause then named two daughters and provided that if either was deceased her portion should be transferred to the survivor, and in case of the death of both, to a daughter-in-law named or her heirs. In an action to obtain a construction of the will, *held*, that there was no unlawful suspension of the power of alienation; that the suspension was not for an arbitrary and fixed period, nor was the trust so limited, but

both inevitably terminated upon the expiration of the two named lives, and could only run for the ten years on condition that one or both of the selected lives continue so long. *Id.*

3. By another clause of the will certain shares of stock were given to a daughter-in-law of the testator to be held "in trust seven years" from his death for the benefit of the daughter-in-law and her daughter, and then to be transferred and delivered to the latter. In case of the death of the grandchild before the expiration of the seven years, it was provided that "this bequest to her shall be given and transferred to her mother;" if both die, then "to the heirs" of a son of the testator. *Held*, that the trust was measured by two lives in being at its creation, and so was valid; that by the provision for the ultimate vesting of the stocks in the "heirs" of the testator's son, those who would be next of kin if he were dead were intended. *Id.*

4. By another clause the testator gave to M., a daughter, a house and lot with the furniture therein "for her occupancy and use," the same (using the language of the will) "to be held in trust by my executors seven years from and after my decease," also certain shares of stock, the dividends to be collected and paid to the daughter. At the expiration of the seven years it was provided that "the foregoing bequests shall be transferred and delivered to" M. If M. should die before the expiration of the seven years it was provided that "these bequests shall be delivered to or disposed of" as a daughter and a son of the testator named "shall request and direct," the proceeds to be paid to three persons named. *Held*, that the trust was valid, as it only ran for one life or the shorter period of seven years within that life; that although the testator described his property as "bequests" it covered the real as well as the personal property; that the provision giving some power or authority to the son and daugh-

ter could not be construed as a power of appointment or as conferring upon them any estate, but simply made them arbitrators in case of any disagreement between the three beneficiaries as to an actual division or a sale and division of the proceeds. *Id.*

5. Another clause provided that "from the cash funds" belonging to the testator in a bank named, his funeral and burial expenses and other just claims against him should be paid, and the residue, if any, paid to M. The will was executed in November, 1889. In November, 1890, the testator borrowed \$300 from said bank, giving his note therefor. In December thereafter he executed to the president and cashier of the bank a formal transfer of ten shares of stock, containing a power of sale which he sent to the transferees with a letter directing them to pay with the proceeds his indebtedness to the bank and pay the balance to M. In 1891 the testator paid the note, but left the stock in the hands of the bank, and soon thereafter procured another loan. At the testator's death there was about \$150 to his credit on the books of the bank. *Held*, that the words "cash funds" in the bank included only the balance on deposit to the credit of the testator at his death, and that the stock was transferred simply as collateral. *Id.*

6. The second loan had not been paid, but the bank had not resorted to said collateral. M. was the testator's housekeeper, and he was in the habit of giving her money to pay household expenses. The trial court adjudged that an express trust was created in the stock for the benefit of M. *Held*, that this portion of the decision was invalid; that the action being simply for the construction of the will the court had no power to go outside of it, and construe an independent business agreement. *Id.*

7. *It seems*, that no trust was created in the stock, nor was there a gift thereof to M. *Id.*

8. Where in a will there is a clear and certain devise of a fee, about which the testamentary intention is obvious and without ambiguity, the estate thus given will not be cut down or lessened by subsequent words which are ambiguous or of a doubtful meaning. *Benson v. Corbin*. 351

9. The will of B. gave to his wife the use and occupation of two dwelling houses during life, and provided that "in case of the sale of either or both with her consent the income of the principal shall be paid to her;" he then devised said dwelling houses to two children, subject to the life occupancy of their mother, and also devised to them all his other real estate subject to her dower right. By a subsequent clause it was provided that in case of the death of both of the children without issue the property devised to them "and their issue" shall not pass to the branches of his own or his wife's family, but is "given, devised," etc., to a beneficiary named. In an action for specific performance of a contract for the purchase of a portion of the real estate of which the testator died seized, wherein the question as to the validity of plaintiff's title depended upon the construction of the will, it appeared that aside from the two dwelling houses the testator's real estate consisted principally of a large tract of sandy and barren land on the sea shore from which he had been selling lots for summer homes, and which was only valuable for such purposes. *Held*, that the death without issue referred to in the devise over meant a death in the lifetime of the testator, and as the two children named survived the testator they took an absolute fee in all the lands subject to their mother's life estate and dower right. *Id.*

10. The holographic will of K. by its terms gave to his executors all of his estate, in trust, among other things to divide the income into four equal parts, one part to be paid to his wife during life, upon her death (using the language of

the will) "her share to revert to my trustees for the benefit of my three children, their heirs and assigns, under the supervision of my trustees," to each of the children one-third; the testator left another child aside from those referred to and named in said provision. In an action for the construction of the will, *held*, the testator's intent was that his widow should receive the income of one-fourth of his estate, and this vested in her an equitable life estate in the share itself; that upon her death the purpose for which the trust was created was served, the estate of the trustees terminated, and the whole legal and equitable estate vested absolutely in the three children. (1 R. S. 677, §§ 47, 48.)
Hopkins v. Kent. 363

11. C. died leaving a will by the terms of which he devised to his widow the use of his "homestead premises," the only real estate left by him, during her life, and the remainder to the testator's legal heirs. The will directed that the taxes and repairs on the premises should be paid by the executor from the general estate in his hands "without burden or charge" upon an annuity also given the widow. It was further provided that in case the widow "should rent the whole or any part of said homestead she shall pay a part of the taxes * * * proportionate to the part so rented," and that the executor, on paying such taxes as she should pay, might retain the same out of the annuity. The general estate became exhausted, and thereafter the taxes and annuity were not paid. The property was sold for unpaid taxes and was redeemed by plaintiff, one of

the remaindermen. In an action to compel payment of the taxes by the widow, or the appointment of a receiver to rent the premises and apply the rents and profits to such payment, *held*, that the intent of the testator was that the general estate should bear the burden of the expenses connected with the maintenance of the life estate, and that in no event, save in that specified, *i. e.*, a rental by the widow, should her life estate be charged with the taxes; and so, that it was the duty of the remaindermen to pay the same. *Clarke v. Clarke.* 476

12. H. by his will gave to his wife the use of his dwelling house until his farm should be sold. It directed a sale of the farm as soon after his decease as it could be done without undue sacrifice, and a reservation out of the proceeds of the sale of \$4,000 for the use of his wife during life, the same after her decease to be divided among his three children. The testator then gave to his children, within one year after the aforesaid sale of real estate and the reservation for the use of the wife, the whole of the balance of his property. Debts owing by the children were referred to as a part of their inheritance. One of the children died during the lifetime of the widow. In an action for the construction of the will, *held*, that the intent of the testator was to give to the children all of his estate except that given to the wife, and so it covered the trust fund as a remainder; that at his death the title vested in the three children, and the share of the one who died passed upon her death to her representatives. *In re Young.* 535

ERRATUM.

144 N. Y. page 499. — Fourth line from bottom of page, word "clerk" should read "court."

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